Financial Services Arbitration under the LCIA Rules: An Outlook

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In 2018, financial services disputes accounted for the largest share of disputes referred to the London Court of International Arbitration (LCIA). With indications that the LCIA may adopt a form of summary dismissal procedure in its revised Arbitration Rules this autumn, the LCIA could become an even more important forum for banking and financial services disputes in the coming years.

The LCIA – attracting more financials services disputes than other institutions

29% of all cases commenced at the LCIA in 2018 arose in the financial services sector. This figure is up from 24% in 2017 and significantly higher than comparable figures for other major institutions (to the extent that they publish figures for the banking and finance sector separately). At the Hong Kong International Arbitration Centre (HKIAC), 12% of disputes in 2018 were allocated to the finance sector (up from 6% in 2017), whereas at the International Chamber of Commerce (ICC) the "Financing and Insurance" sector accounts for somewhere between 5% and 8% of all cases. At the Singapore International Arbitration Centre (SIAC) – based in another financial hub – "banking and financial services" is included in the catch-all category for "other" sectors, which covers 10% of new cases in 2018 (up from 4% in 2017) but which also includes energy, insurance, and intellectual property disputes.

Another significant figure from the LCIA's 2018 statistics is that 21% of all new arbitrations were commenced under a "Loan or Other Facility Document" (24% in 2017) which indicates that the nature of the dispute is inherently financial rather than merely a commercial dispute involving a financial institution.

London – a financial (and arbitration) hub

London's status as a global financial hub goes some way to explaining the importance of financial services disputes under the LCIA Arbitration Rules. Lower figures in Hong Kong and Singapore-based institutions show, however, that this cannot be the only explanation.

Many finance documents entered into by international parties are governed by English law – even if there is no direct connection with England – because English law is seen as a good choice for finance

contracts, providing practical and commercial solutions to a number of issues. English-seated arbitration is also a popular choice, for example because under English law unilateral option clauses are permissible. These clause are frequently requested by financial institutions (for example in loan transactions and derivatives involving emerging markets), as they allow the institution to choose the dispute resolution mechanism (e.g. arbitration or litigation) after the dispute has arisen depending on the circumstances of the case. However, such unilateral option clauses have been challenged under the laws of some other seats (e.g. France).

Where a contract is governed by English law, parties may therefore be inclined also to choose London-seated arbitration. The choice of the LCIA then often follows naturally when selecting an arbitration institution.

Arbitration – a dispute resolution mechanism which has become increasingly attractive to financial institutions

Historically, the financial services sector had been less enthusiastic about arbitration than other sectors (e.g. construction and energy). This was in large part due to perceived downsides of arbitration such as difficulties in conducting proceedings with multiple parties and under multiple contracts, a lack of binding precedent and the lack of expedited or summary proceedings.

That arbitration is used more and more in financial disputes is, at least in part, thanks to modern institutional rules which facilitate the joinder of parties to existing arbitration proceedings and the consolidation of parallel proceedings. Most modern rules also offer expedited timetables for straightforward claims and interim or emergency measures for especially urgent cases.

The ease of enforcing arbitral awards in foreign jurisdictions under the New York Convention – when compared with the difficulties of enforcing court judgments abroad, at least outside the European Union – is another reason why banks increasingly opt for arbitration at a time where their business is increasingly conducted in emerging markets.

Many banking and finance disputes also involve financial products which are becoming ever more complex. In this context, financial institutions value the ability for the parties to choose their own arbitrators, in particular arbitrators with extensive experience in, for example, the type of financial products to which the dispute relates. A number of highly qualified arbitrators with finance expertise are available and arbitral bodies are also sharing their panel lists to make the process of selecting a suitably qualified arbitrator easier.

Another reason for using arbitration is the relative convenience with which parties can agree to keep their arbitration private and confidential. This can be particularly attractive in the securitisation context or where, during the course of the dispute resolution process, details of a party's financial difficulties would emerge.

Summary or early dismissal – making arbitration even more attractive in future for the financial services sector?

The latest development in arbitration practice is the introduction of summary or early dismissal. Such a procedure – the equivalent of a summary judgment procedure in the English courts – allows parties to request that claims, issues or defences that clearly lack merit be dealt with quickly, without the need to go through all the steps of an arbitration, including a hearing.

The lack of a summary or early dismissal procedure in arbitration has, for a long time, been cited as one of the key reasons why clients in the banking and finance sectors preferred litigation in the English courts over arbitration.

In LCIA arbitrations, banking and finance parties appear more often as claimants (21% of claimants vs 12% of respondents in 2018, and 23% vs 9% in 2017). Some of these cases arise where a debtor is in contractual default and has no arguable defence. In the absence of summary dismissal procedures, however, the claimant financial institution will have to conduct a full arbitration, potentially including a full merits hearing, before receiving an award determining that the money is in fact due and the debtor has no defence. The early dismissal procedure allows the claimant to apply to the tribunal and receive an award without going through all the steps, thereby saving both time and expense.

While there are concerns that arbitration awards obtained through summary or early dismissal might not be enforceable in certain jurisdictions because a party has been deprived of its right to have its case heard, most institutions appear to consider that this concern is outweighed by the benefits of a summary dismissal. Whether an enforcement risk exists depends, in the end, on the jurisdictions and parties involved. The English courts have been open to the idea of summary processes in arbitration; for example, in *Travis Coal v Essar Global Fund* [2014] EWHC 2510 (Comm), the High Court found that the tribunal had complied with its duties to be fair and treat parties equally despite having issued an award using some summary processes.

Institutions such as the SIAC, HKIAC and the Stockholm Chamber of Commerce introduced summary dismissal procedures in their latest set of rules and the ICC clarified in a practice note that ICC tribunals have the power to summarily dismiss claims or issues. It is widely expected that the LCIA will introduce an early dismissal procedure in its 2019 revised rules to be published this autumn.

This could further strengthen the trend of parties to financial transactions choosing the LCIA Arbitration Rules as a go-to dispute resolution mechanism in their finance documents.

Future growth for financial services arbitration at the LCIA?

A growing number of financial services arbitrations are seated in London, and this trend is likely to continue, at least in the short to medium term. An increasing number of financial documents entered into in recent years contain LCIA arbitration clauses, and some of these contracts will give rise to disputes which will be submitted to arbitration at the LCIA.

The anticipated LCIA rule change providing for some form of summary dismissal procedure may also encourage financial institutions to include LCIA arbitration in their contracts, and thus lead to more financial services arbitrations in the medium term. This trend may be amplified by the uncertainty surrounding Brexit, which may encourage some parties to move away from English court litigation to London-seated arbitration.

In the longer term, whether financial services arbitration in London continues to grow will depend to some extent on whether the UK will leave the EU with or without a deal, and how banks react to the final outcome. If London maintains its status as a thriving financial centre and an attractive place to do business, the LCIA is likely to benefit from a continued influx of new financial services arbitrations in the long term as well.