Kluwer Arbitration Blog

Are Banks Changing? The New Big Industry for International Arbitration?

Loukas A. Mistelis (School of International Arbitration, Queen Mary University of London (QMUL)) · Wednesday, October 2nd, 2013 · Institute for Transnational Arbitration (ITA), Academic Council

There has been a historical antipathy of banks towards arbitration. Banks (and other financial institutions) had no incentive or particular advantage to utilize private and quicker dispute resolution methods, such as mediation and arbitration. Well-run banks will normally be in possession of collateral security before money is made available to lenders or other customers and also the interest rates were appropriate and well above inflation so there was invariably no urgency in resolving disputes quickly, let alone out of court. As a result, all major banking law academics and practitioners would not consider arbitration clauses in banking or finance contract. When such clauses were introduced occasionally they were unilateral clauses and in some instances considered invalid.

Of course, there are always exceptions: Professor William Park has written a seminal and pioneering article "Arbitration in Banking and Finance," 17 *Annual Rev. Banking L.* 213 (1998); reprinted in 1997 *Y.B. Int'l Fin. & Econ. L.* (1999) 141; adapted for *Banks and Remedies* 187 (W. Blair, ed., 2d ed. 1999) and also Professor Klaus-Peter Berger has written on the topic, by way of example in a volume edited by DIS where there are also contributions by Balzer, Gillor, Quinke and Wiegand, DIS (Hrsg.), *DIS Materialien XIV, Schiedsgerichtsbarkeit in Finanz- und Kapitalmarkttransaktionen*, 2008. This 10-year difference between these publications also highlights the time of shift in attitudes. The recession and financial crises in the 2000s challenged banks and their livelihood considerably. Debts were considered or become "toxic" and losses were critical for major financial institutions which started to tremble or even collapse.

In 2009 at the initiation of the International Swaps and Derivatives Association (ISDA) a roundtable was organized and hosted by DIS and University of Cologne to explore the increasing importance of arbitration for banking and finance. Audley Sheppard timely reported and reflected on this roundtable here. Since then quite a bit has happened, most notably (a) the launch of the Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance), a brainchild of Jeff Golden which gathers momentum and has the ambition of institutionalizing the arbitration of complex financial disputes with the assistance of capacity building and most recently (b) the launch of the new ISDA Model Agreement with optional arbitration clauses and published guide to arbitration.

All of these developments are very important indeed if one were also to consider a few additional facts and/or considerations. First, recent empirical evidence supports the view that banks or at least their general counsel are considering arbitration more often than previously thought to be the case. The evidence is supported by the QMUL School of International Arbitration and PwC survey on industry perspectives in relation to arbitration. According to this 2013 survey, although banking and finance is lagging behind construction and energy industries which are much stronger supporters of arbitration, with 84% and 78% of the industry respondents supporting arbitration respectively, the percentage for banking and finance is nevertheless quite significant at 69% with less than one quarter of general counsel in banking and finance declaring arbitration to be their most preferred option. The picture seems to be quite different (and more encouraging for arbitration) if one were to consider the views of outside counsel who seem to be very supportive of arbitration. In certain jurisdictions, such as Switzerland and France but also Germany such support is higher. This is also the case in Asia and the Middle East region, as well in Eastern Europe.

Second, arbitration institutions have received and administered a good number of cases involving banks or other financial institutions. For example, in LCIA in 2012 11% of their cases relating to banking and finance matters while the percentage was 17.5% in 2011 and 11% in 2010. This is objectively a significant percentage of the caseload at LCIA and it does not include as such cases where finance is also a legal issue in the background of another transaction. AAA-ICDR reports that financial services disputes belong to the common referrals they administer and so does ICC. One could reasonably draw the conclusion that nearly 10%, if not more of all institutional arbitration cases relate to banking and finance disputes.

Third, banking and finance disputes have started to emerge in investment arbitration (ICSID or otherwise). For example, while for many years only two disputes were seen as banking and finance disputes, namely *Fedax v Venezuela* (1998) or *CSOB v Slovakia* (1999); now we also have the more recently case *Deutsche Bank v Sri Lanka* (2012), *Abaclat v Argentina* (2011 and ongoing) and more recent claims brought by Greek investors against Cyprus and cases brought by Slovak and Cypriot investors against Greece, to name but a few. Many more cases are in the public domain and the range of disputes is extending, from traditional loan or other finance agreements to derivatives, bondholders' protection, sovereign debt restructuring and "haircut".

Fourth, one can identify nowadays many more arbitrators and arbitration lawyers with finance expertise. This provides comfort to banks and financial institutions as one of their historical concerns about arbitration was the lack of finance and banking experts who could also manage a complex financial dispute as arbitrators. At least P.R.I.M.E. Finance is putting together a non-exhaustive list of experts in finance and arbitration and there is most certainly a group of younger arbitration lawyers who seamlessly cover both areas very competently. This younger group is added to some very high profile arbitrators, such as, for example, Park and Berger, who have been able to move between both banking and finance and arbitration for few decades.

It is also worth noting, that also in France a group led by Georges Affaki of BNP Paribas has explored the potential for further interaction between the banking and finance industry and arbitration and came to similar conclusions having canvassed views not only in France but in a number of leading jurisdictions.

The revised ISDA Model Agreement and the ISDA Guide to Arbitration and P.R.I.M.E. Finance provide an unprecedented banking and finance industry endorsement for arbitration. ISDA model arbitration clauses provide a number of options: (1) English law, London seat, ICC Rules; (2) New York law, New York seat, ICC Rules; (3) English or New York law, Paris seat, ICC Rules; (4) English law, London seat, LCIA Rules; (5) English or New York law, Hong Kong seat, HKIAC

Rules; (6) English of New York law, Singapore seat, SIAC Rules; (7) New York law, New York seat, AAA-ICDR Rules; (8) English or New York law, Zurich or Geneva seat, Swiss Chambers' Arbitration Rules; (9) English law, London seat, PRIME Finance Rules; (10) New York law, New York seat, PRIME Finance Rules, and English or New York Law, The Hague seat, PRIME Finance Rules. In this way, a wide choice is being given in terms of arbitral seats and arbitration rules / arbitration institutions. Such endorsement will not bear fruits until the arbitration world can also convince the banking and finance industry, by actions rather than rules, that arbitration is the appropriate mechanism for the resolution of their disputes. In this respect appointment of knowledgeable (subject matter expert) and service-oriented arbitrators together with the adoption of efficiently managed procedures (including, *inter alia*, emergency procedures and interim measures of protection) will provide the level of confidence and comfort markets would expect from arbitration as a process. The jury is out but the arbitration community can certainly do this!

This entry was posted on Wednesday, October 2nd, 2013 at 7:00 am and is filed under Arbitration, Arbitration Institutions and Rules, Banking and Finance

You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.