Kluwer Arbitration Blog

ICC Report Identifies Financial Institutions' Experience and Perceptions Of International Arbitration

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The new ICC Report on Financial Institutions and International Arbitration finds that the oft-cited financial institutions' averseness to arbitration, abstractly stated, is incorrect. Financial institutions' perception of arbitration is rapidly evolving in the wake of the global financial crisis, the sovereign debt crisis, the digitalization of banking, and the new regulatory approach to bank resolution. With the data disclosed in the Report, arbitral institutions are in a strong position to engage further with financial institutions and their regulators, and financial institutions have the tools to utilize arbitration as a viable alternative to litigation.

The methodology

The Task Force took stock of the use of arbitration in banking and financial disputes through interviews with more than 50 financial institutions. The Task Force also collected statistics from 13 arbitral institutions and conducted an in-depth examination of relevant investment and commercial arbitration awards.

Recognizing that one size does not fit all, the Task Force analyzed all the fields of corporate and investment banking including: derivatives, sovereign lending, investment arbitration and banking instruments, arbitration in bank regulatory matters, international financing (including syndicated loans and trade finance), Islamic finance, multilateral and development finance, advisory banking, asset management, and interbank arbitration.

The Report

The Report starts by setting the record straight regarding the use of arbitration in banking and finance. Financial institutions use arbitration. They do so in situations which require a neutral forum and decision makers with specialized knowledge, such as project finance involving sovereign counterparties in emerging countries, derivatives in certain regions of the world, notably in Asia, sensitive capital restructuring and mergers/acquisitions, certain multilateral loans, and asset management. However, the Report also notes that financial institutions neither use arbitration regularly nor as a default rule.

The Report offers recommendations regarding how financial institutions may adapt arbitration to their requirements and identifies the many features that make arbitration attractive for businesses.

These include the international recognition and enforcement of awards amongst the 160 New York Convention member countries, the choice of arbitrators, the adaptability of the arbitral procedure potentially offering an opt-in appeal, and the possibility to obtain from the tribunal provisional measures and early dismissal of claims. In underscoring the flexibility of arbitration, the Report emphasizes its potential accommodation both of the expectation of confidentiality in certain banking businesses, such as advisory banking, and of standard-setting precedent publication that other banking businesses, such as syndicated lending and derivatives, require to control risks in their field.

The Report also offers insight into the opening of investment arbitration to banking and financial instruments. In the past decade, investment arbitration awards have determined that various financings, the operation of bank networks and the issue of sovereign bonds, bank guarantees and derivatives, to have the qualifying elements of protected investments. Barring a particular carve-out in the applicable investment treaty, a dispute between an investor (often a financial institution or its foreign shareholders) and the host State in relation to those instruments becomes potentially eligible for treaty protection and adjudication by an international arbitral tribunal, even though the relevant banking contract may not include an arbitration clause. Recent awards have allowed banks and their shareholders to seek vindication for expropriation or discriminatory actions by national bank regulators which were either prompted by political motives or denied their due process rights.

The new findings published in the report are expected to become the linchpin of a constructive dialogue between arbitral institutions and federations of financial institutions, thus heralding a new era in banking and financial dispute resolution.

Georges Affaki and Claudia T. Salomon *co-chaired the Task Force on Financial Institutions and International Arbitration that prepared the Report.*

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