

Kluwer Arbitration Blog

Using Arbitration to Resolve International Financing Disputes

Charles Nairac (White & Case) and Jean-François Adelle (Jeantet) · Friday, December 23rd, 2016 · White & Case

The ICC Commission on Arbitration and ADR's Task Force on Financial Institutions and International Arbitration recently published its '[Report on Financial Institutions and International Arbitration](#)' (the "Report"). The undersigned had the honour of leading the work stream on "International Financing" and the findings of that team are summarized in Section IX (International Financing) of the Report, which we present below.

Scope of the Work Stream

International Financing encompasses within it a broad scope of transactions where the parties and/or assets are located in several countries, including bilateral and syndicated lending transactions (secured and unsecured), asset finance, project finance and trade finance. The aim of our stream of the Task Force was to identify current trends in dispute resolution in international financing and to assess the effectiveness of arbitration to resolve disputes arising out of international financing.

Historical Reticence

The Task Force's survey of financial institutions revealed, as was already well known to all members of the stream, that there has been a historical reticence to relying on arbitration as a means for resolving international financing disputes. Within the different types of transactions, we noted a stronger resistance to using arbitration in the syndicated lending and asset finance sectors, as opposed to project finance transactions. This resistance stems largely from cultural factors and been fueled by inertia and standardized documentation. Apart from this reticence, some financial institutions also cited the unsuitability of arbitration to cater to the requirements of financial disputes (particularly the restricted range of available interim measures) and the inability to generate binding legal precedents.

This historical resistance has been exacerbated in the arena of secured transactions, due to the uncertainty of enforceability of security rights over assets through arbitration. Court intervention was viewed as somewhat preordained and recourse to arbitration was perceived to be an exercise in futility. Although often unfounded, the belief in such practical inarbitrability of security agreements continues. It is correct that, for those security rights whose enforcement requires the intervention of a court (if not enforced voluntarily), it will not make sense to choose arbitration as a means of dispute resolution. But whenever the security at issue is self-enforcing, there is no inherent reason for disputes arising out of such security to be referred to a national court as

opposed to an arbitral tribunal.

Concerns have occasionally been voiced that arbitration may result in short-circuiting third party rights, especially in the context of insolvency proceedings. That concern is baseless. The decisions rendered by arbitral tribunals will always be subject to compliance with the decisions of the insolvency court on matters over which it has mandatory and exclusive jurisdiction, such as the validity of security posted during the lookback period and the approval of the statement of secured claims, and with the timetable of the insolvency proceedings.

Mapping the change in trends

The trend has however begun to shift away from the historical resistance to arbitration. Indeed the Task Force stream found that arbitration is increasingly used, as opposed to court litigation, where parties and assets are subject to courts perceived as inadequate for the protection and enforcement of the financier's rights, and no agreement can be reached on the choice of a court deemed acceptable by the parties. This was especially true for project finance transactions, as well as for financing transactions in general, centered in Latin America, CIS or Africa, and for transactions involving State or State sector entities as counter-parties. It was also noted that self-enforcement is an increasingly available option in security laws and when the intervention of a court remains necessary, it is restricted to secured asset enforcement issues as opposed to adjudication on the secured claim.

Although no marked preference for either arbitration or litigation was found in trade finance, there is a growing recognition that court litigation is not the most suitable forum for resolving disputes in such transactions and that arbitration is capable of being tailored to specific contexts.

What does arbitration have to offer?

The ease of enforceability of an arbitral award across jurisdictions due to the popularity of the [New York Convention, 1958](#) is a key advantage offered by arbitration.

In addition, arbitration offers the benefits of expert decision-making in complex disputes, flexibility, neutrality, and a confidentiality regime which the parties can design according to their needs and preferences (ranging from the fullest confidentiality extending even to the mere existence of the proceedings, to a regime of full publicity). Arbitration can also offer the advantage of avoiding fragmentation of remedies across multiple court fora, by providing the option for financiers to enter into multiparty dispute resolution mechanisms and/or consolidation of arbitral proceedings. Arbitration also provides the parties the flexibility to be able to isolate and segregate issues into separate proceedings, for example separating reimbursement actions from disputes relating to commercial contracts entered into by the project company.

Whither Litigation?

What does the (admittedly timid but nevertheless real) change in trend indicate for the future of dispute resolution in international financing? As pointed out above, arbitration is likely to continue to attract users where there are qualitative concerns about the national courts available as alternatives to arbitration. Whether the parties choose arbitration or litigation will depend on which mode of dispute resolution is more suitable for the specific transaction at issue, especially in light of the parties involved and an assessment of the available alternatives. In many cases, arbitration

will prove to be a very attractive option.


To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).


Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

The graphic features a dark background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

This entry was posted on Friday, December 23rd, 2016 at 5:12 am and is filed under [Financial Industry](#), [ICC Commission Report on Financial Institutions and International Arbitration](#), [International Financing](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.