

Growing Acceptance of Arbitration in International Commercial Financial Transactions

Contributing Partners

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Financial institutions have historically been skeptical about arbitration in the commercial context. As a result, the documentation used in commercial financial transactions has generally required that disputes be submitted to the courts of a particular jurisdiction. In recent years, however, these institutions have shown an increased interest in considering the relative merits of arbitration for certain complex international financial transactions, and a number of initiatives have developed in response.

Historically, financial institutions have been reluctant to use arbitration due to concerns relating to the risk of unpredictable outcomes and to a perceived lack of financial expertise among arbitrators. In contrast, financial institutions place a high degree of confidence in New York and England courts and believe that, due to the application of precedent, the courts provide consistency and uniform development of the law. Courts also have been preferred for the availability of summary or default procedures for many types of disputes and the ability to appeal trial court decisions.

Various studies have shown, however, that such assumptions are being reconsidered and that an interest in arbitration has increased in the financial services sector. In 2017, the International Chamber of Commerce's Commission on Arbitration and ADR published a report titled "Financial Institutions and International Arbitration," which examined "financial institutions' perceptions and experience of international arbitration" and suggested that financial institutions "increasingly" have "view[ed] international arbitration as an important alternative to litigation."

This shift is a result of several factors. First, when the courts were flooded with disputes over complex financial products following the 2008 financial crisis, assumptions about the advantages of having disputes heard by the courts proved inaccurate. Far from being

predictable, there was a sense that the courts at times rendered inconsistent judgments and had limited expertise with complex financial products and not enough time to devote to such disputes due to overburdened dockets. The appellate courts were perceived to have similar issues. Summary adjudication procedures often proved ineffective, leading to extensive and expensive discovery. Moreover, unlike in arbitration proceedings, courts are reluctant to allow parties to keep information from the public eye, meaning that confidentiality was not readily available.

Additionally, the increase in business in emerging markets has given rise to new considerations concerning the ease of judgment enforcement across borders; courts in emerging markets may not readily recognize and enforce U.S. or English judgments. At the same time, courts in these markets may themselves lack expertise with commercial matters and the independence that financial institutions expect in New York and England. In some instances, parties in emerging markets may now have more leverage and bargaining power with counterparties, such that counterparties may no longer be able to impose a preference for litigation in New York or London.

In light of these developments, some industry organizations have taken the initiative to include provisions for arbitration in their standard documentation.

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For example, in 2013, the International Swaps and Derivatives Association (ISDA) released its ISDA Arbitration Guide, which was the result of consultation with ISDA members beginning in 2011. It provides guidance on the use of arbitration clauses with the ISDA 2002 Master Agreement or ISDA 1992 Master Agreement and includes 11 model clauses. More recently, in 2017, the Loan Syndications and Trading Association issued new trading documents for loans governed by New York law and made to borrowers in Chile, Colombia or Peru, which provide for arbitration under the rules of the International Centre for Dispute Resolution. In both instances, these associations appear to be tapping into the features of arbitration — such as the relative ease of worldwide enforcement — that make it attractive in cross-border transactions.

Another significant initiative aimed at addressing the perceived lack of arbitrators with expertise in complex financial products has been the establishment of P.R.I.M.E. Finance (Panel of Recognised International Market Experts in Finance), a nonprofit Dutch foundation launched in January 2012. Among the services it provides is dispute resolution, including a panel of arbitrators with expertise in resolving complex financial cases and arbitration rules customized for these disputes. As of December 2015, arbitrations under P.R.I.M.E. Finance Arbitration Rules have been administered by the Permanent Court of Arbitration located in the Peace Palace in The Hague.

Finally, various arbitral institutions also have recently promulgated rules that may make arbitration more attractive

to financial institutions. Examples include new rules addressing multicontract arbitration, providing for summary disposition of certain claims and offering expedited procedures.

These developments may address some of the reluctance by financial institutions to use arbitration. While certain transactions will not lend themselves so readily to arbitration, for other types of disputes, it may be an option that should be explored when drafting dispute resolution provisions.