

CROSS-BORDER DISPUTES AND ARBITRATION IN THE INTERNATIONAL FINANCIAL-BANKING AREA

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SUMMARY

Companies and large corporations in the real economy, especially those in the energy, manufacturing and insurance sectors, have long recognized the advantages of arbitration over national courts for the resolution of disputes between companies. On the other hand, in the financial services and banking industry, all forms of out-of-court dispute resolution are met with a dose of indifference, and in most cases with suspicion. This is due to the fact that the banking industry is traditionally more withdrawn from rapid changes, and without being completely sure that the new changes will not bring new risks, and that it will not be able to manage adequately, being added to the regulatory requirements in terms of prudential management of banks' assets, they will never implement new solutions for resolving disputes, until there are clear rules between the players in the financial-banking market, however some premises for changes are already visible.

Key words: international arbitration, financial market, banks, cross-border disputes, courts, complex transactions, institutional arbitration.

ARBITRAJUL LITIGIILOR TRANSFRONTALIER ÎN DOMENIUL FINANCIAR-BANCAR INTERNAȚIONAL

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REZUMAT

Companiile și marile corporații din economia reală, în special cele din domeniul energiei, industria prelucrătoare și din asigurări au recunoscut de mult avantajele arbitrajului față de instanțele naționale pentru soluționarea litigiilor dintre companii. Pe de altă parte, în industria serviciilor financiare și bancare, toate formele de soluționare extrajudiciară a litigiilor sunt întâlnite cu o doză de indiferență, iar în cele mai multe cazuri cu suspiciune. Acest lucru se datorează faptului că industria financiar-bancară, în mod tradițional, este mai retrasă față de schimbările rapide, și fără a fi sigură în totalitate că noile schimbări nu vor aduce și riscuri noi pe care nu le va putea gestiona adecvat, fiind adăugate și cerințele regulatorii în materie de administrare prudențială a activelor băncilor, acestea nu vor pune niciodată în aplicare soluții noi de soluționare a litigiilor, până nu vor fi reguli clare între jucătorii din piața financiar-bancară, totuși unele premise spre modificări deja sunt vizibile.

Cuvinte-cheie: arbitraj internațional, piață financiară, bănci, litigii transfrontaliere, instanțe judecătorești, tranzacții complexe, arbitraj instituțional.

Introduction. The extrajudicial or amicable resolution of disputes between two players in the financial-banking market and preventing their escalation in courts are worthy objectives for any parties in a business relationship. The choice of dispute resolution mechanism is crucial in drafting and negotiating financial transactions. Usually, creditors insist that their preference be included in the financial agreement, and therefore dispute resolution clauses in such transactions primarily reflect creditors' interests, and creditors seek efficient dispute resolution, whether in arbitration or in courts. Traditionally, large international banks and other financial corporations have preferred court choice clauses over arbitration.

Creditors prefer dispute resolution venues that are renowned for consistent jurisprudence and reliable decision-making, and where decisions will be recognized internationally. This is why London and New York courts are often selected in choice of court clauses, and for reasons of stability, predictability, and financial expertise, Swiss and Luxembourg courts have also been considered in the last decade. At the same time, creditors are interested in choosing venues where there are low risks of influence on dispute resolution, to reduce risks to their own business. This is the main reason why financial and banking entities worldwide are accustomed to choosing neutral jurisdictions, where decision-making is considered independent, thus avoiding political interference and other possible risks within a state with a high degree of corruption. Also, often neither party to the transaction feels comfortable appearing in courts in the other party's home country but would prefer to take the dispute to neutral but safe territory for both parties.

Simultaneously, financial corporations and lending banks prefer their disputes to be judged by seasoned experts in the field, meaning the arbitrator should not only know the applicable law and relevant procedural rules but also understand the differences between stakeholders in financial transactions, have commercial understanding, and seek the economic rationale of clauses and provisions beyond the letter of the law, understanding the complexities of international finance. In the context of finance internationalization, this has become an extremely complex and complicated area, so financial-banking market players prefer to entrust their disputes to competent persons with sufficiently broad expertise, whether in courts or international arbitration. Most often, international finance corporations select courts in major financial centers, such as London and New York being the most frequently chosen, but also Paris, Geneva, Zurich, Luxembourg. Such jurisdictions are considered to offer neutrality due to the low risk of interference from political or other unwanted actors in court and arbitration activities, good professional training of judges and the ability to understand complex commercial transactions, consistent and predictable decision-making, producing judgments that are respected and enforceable abroad.

Results and discussions. Since the early 2000s, there has been a significant increase in the use of arbitration in the financial-banking sector. This is mainly the result of financial institutions expanding into emerging markets in Eastern Europe, Asia, and Africa, as well as the greater

ease of enforcing an arbitral award in those jurisdictions, as opposed to a court judgment, which may encounter some difficulties in enforcement. For many financial entities, going to court remains their preference if this is an acceptable choice from a law enforcement perspective. However, arbitration benefits from the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In theory, at least, national courts in each of the 157 contracting states must recognize an arbitral award as binding and enforce it, subject to a limited number of exceptions [1].

Although enforcement practice is not always as easy as it appears on paper, there is no comparable regime for court judgments at the global level. While Council Regulation (EC) No. 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2], later, Regulation (EU) No. 1215/2012 of December 12, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), have allowed relatively easy enforcement of court judgments within the European Union, however outside the Union, enforcing a court judgment even in the United States remains considerably more difficult. On the other hand, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards gives arbitration an advantage over common court litigation, as it can substantially reduce the enforcement risk associated with transactions involving parties in the emerging markets listed above [3].

An advantage of arbitration is that parties have considerable latitude to adapt their arbitration agreements to suit their specific transaction or business needs, with a wide range of options available to parties in a financial transaction in their arbitration clause, from basic aspects such as choice of venue and institutional rules, to more customized aspects such as control over personal data protection or other confidential data, as well as provisions for accelerated case proceedings. Some of these options address the perceived deficiencies of arbitration by financial institutions. Many of these aspects can be agreed upon when a dispute arises and arbitration begins.

Parties can choose either institutional arbitration, where they select an arbitration institution to administer the arbitration process and agree to follow that institution's rules, or ad-hoc arbitration where there is no institution administering the process and the arbitration is conducted in accordance with a set of rules such as rules developed by the parties or the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules, which is the central legal body within the United Nations system in the field of international commercial law. The advantages and disadvantages of ad-hoc versus institutional arbitration continue to be discussed in practice by experts in the field, however, each financial entity chooses the option most appropriate to its case [2]. The International Chamber of Commerce Commission's report on financial institutions and international arbitration suggests that most financial institutions opt for institutional arbitration to benefit from established rules and available experience in

administering complex cases and high-value disputes. The most frequently selected institutions are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKIAC), and the Singapore International Arbitration Centre (SIAC) [4].

An alternative approach to using a generalist arbitration institution is to pursue arbitration under the rules of an institution with a specific focus on arbitration in the financial sector, such as P.R.I.M.E. Finance (Panel of Recognized International Market Experts in Finance), which has a list of experts in the field, and this innovative approach has found support to date. This is likely because generalist arbitration institutions have not proven as effective in resolving disputes as sector-focused arbitration institutions, specifically in the financial-banking sector, being increasingly capable of making appropriate arbitral appointments for cases involving complex financial transactions.

The seat of arbitration determines the applicable procedural law, courts with supervisory jurisdiction, and the "nationality" of the award adopted for recognition and enforcement purposes. The most frequently selected venues for financial disputes are Geneva, Hong Kong, London, New York, Paris, and Singapore. Not surprisingly, venues in major financial centers such as London, New York, and Hong Kong have proven particularly popular for financial transactions. Moreover, financial institutions tend to favor venues where courts have a reputation for ordering, when necessary, provisional measures such as those securing the action.

As mentioned above, financial institutions tend to be concerned that arbitration is less likely than a national court to achieve a predictable outcome. There is a perception that, rather than strictly enforcing contractual clauses, arbitrators, especially in three-member tribunals, tend to give something to both parties in their awards – possibly as a result of the appointment of a member by the debtor party. A more positive view of arbitral tribunals is that, subject to the law of the seat and the terms of the arbitration agreement, parties have substantial input into the profile and identity of decision-makers, in a way that will never be available to them in national court litigation.

If the right to appoint a party-appointed arbitrator is important to the parties, they must ensure that the arbitration clause grants them this right. While the standard position under some institutional rules is that parties have the right to appoint an arbitrator, this is not the position under the London Court of International Arbitration Rules, for example. Parties may wish to further control the profile of arbitrators by specifying in the arbitration clause particular characteristics that arbitrators must display. For example, they could provide that arbitrators will be qualified in the law governing the transaction or have experience in a particular financial market [5], such as derivatives trading [6]. However, introducing too many restrictive criteria in the arbitration clause may limit the pool of arbitrators ultimately available for selection. Additionally, when drafting the arbitration clause, it may not be obvious what profile the arbitrators should have for that particular dispute. For

example, not all disputes arising within a complex financial transaction necessarily require an understanding of the business line in question – some disputes may focus more on points of contract clause interpretation, which would require a different set of skills in an arbitrator.

Although the use of international arbitration for resolving disputes involving financial institutions, especially banks and large financial and insurance corporations, has increased in the last decade, international arbitration remains an exception rather than a rule for many financial entities. Litigation, traditionally in the financial centers of New York and London, has been the main pillar of dispute resolution in the financial services industry for many years. Outside of consumer credit contracts, the use of arbitration clauses in banking and financial transactions was practically non-existent two decades ago. While this trend has seen some changes in the last twenty years, the use of arbitration as a dispute resolution mechanism in the financial sector is still always viewed as a second option, rarely being selected as a primary solution for disputes between financial companies.

Reflecting on the growing interest in arbitration from the financial services sector, there have been several industry-specific arbitration initiatives in recent years. Some features of arbitration that are usually considered advantageous may not be perceived by financial institutions as being more advantageous than traditional choices of English and New York courts and, in some cases, may even be considered disadvantageous compared to litigation in common law courts. However, financial services institutions may need to reconsider some of these perceptions in light of developments in recent years. Firstly, some financial institutions may perceive that arbitration does not necessarily confer advantages over litigation in London and New York courts regarding expertise and neutrality. Judges in these jurisdictions have solid expertise in resolving financial disputes, and these courts are selected as neutral, creditor-friendly jurisdictions, and most often have no connection to the parties or the dispute in question.

However, market results show that parties in business relationships from emerging markets might be willing to accept the choice of English or New York courts, but due to logistical costs, they would prefer local arbitration, or arbitration in nearby states as a more acceptable alternative, but, in general, expertise and neutrality might not tip the balance in favor of arbitration in these situations. After the United Kingdom's exit from the European Union, the enforceability of English court judgments in the European Union is no longer clear, while arbitral awards are still enforceable in EU country courts as a matter of international convention.

Some financial institutions may perceive the flexibility of arbitral procedure as a disadvantage compared to litigation in English or New York courts. These courts have developed simplified and standardized procedures for resolving financial disputes. Financial institutions' familiarity with these procedures compared to the perceived lack of standardized arbitration procedure may lead to resistance to adopting arbitration

for financial disputes. However, there are many well-established institutional arbitration rules and financial sector-specific rules that establish clearly defined procedures for arbitral proceedings, often in a more user-friendly way than civil procedure rules in court litigation. Financial institutions may also have the misconception that arbitration is incapable of handling interim relief requests or issuing default judgments and would be slower and more expensive than court action. In certain types of financial disputes, confidentiality and finality may not be perceived as more important compared to predictability and certainty regarding the legality and fairness of the final decision. Consequently, the perceived lack of transparency in arbitration has been highlighted as a main concern for most financial services institutions [7].

In particular, given the use of standard documentation in certain types of financial agreements, financial institutions value predictable and consistent interpretation and may want to ensure that the decision is legally correct and fair, as it may have implications beyond the parties to the specific dispute, due to the systemic and interconnected nature of certain types of transactions. At least for these types of cases, financial institutions may be concerned that the confidentiality of arbitration proceedings, the lack of a system of judicial precedent, and the limited grounds for challenging an arbitral award are disadvantageous compared to London and New York courts, which have established binding precedent and are subject to appeal. Often determined by experiences with domestic rather than international arbitration, financial-banking entities may have the perception that arbitral awards do not have the same level of legal rigor as court judgments [8, pp.21-25].

In most key arbitration jurisdictions, challenges to international arbitral awards are limited to attempting to question the tribunal's substantive jurisdiction over the dispute, invoking certain irregularities affecting the tribunal, procedure, or award - that is, procedural fairness, yet arbitral awards are challenged less frequently than national court decisions. Under English law, a party may also challenge an award on a point of law (section 69 of the 1996 Arbitration Act). This is a special feature of arbitration in England and is not mirrored in the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended in 2006, or in the arbitration laws of most other key jurisdictions [9].

In addition to the things mentioned above, arbitral procedures are sometimes perceived as having the following limitations compared to judicial proceedings: due to the consensual nature of arbitration, in multi-party, multi-contract disputes, such as project finance or syndicated loans, there may be difficulties in joining affiliated parties in litigation or consolidating multiple proceedings. These difficulties can arise in costly jurisdictional arguments, and there may be concerns that parties may be subject to multiple parallel proceedings involving related issues and, worst of all, inconsistent or contradictory decisions in those related matters.

Jurisdictional issues and the risk of parallel proceedings are not unique to arbitration: in cross-border litigation, issues of which court has jurisdiction over the

dispute and the risk of multiple proceedings in different courts are often the reason why arbitration is selected in the first place. Moreover, as discussed below, financial services companies may not be familiar with the strong tendency of major arbitration institutions to revise their rules and approach to consolidation and joinder, or with the options available to address such issues through the language in arbitration clauses. Additionally, some types of financial disputes may not be arbitrable in certain jurisdictions, such as disputes involving consumer finance and financial disputes concerning insolvency or in cases where state security interests are at risk. In these types of disputes where there is the possibility of consumer financing or insolvency proceedings, arbitration may not be permitted. [9].

However, several of the "limitations" of arbitration discussed above have been addressed in recent developments in arbitration law and practice. There are also concerns about issues of consistency, predictability, and transparency in arbitration proceedings and arbitral awards, as well as aspects related to the jurisdiction of the arbitral tribunal. For financial institutions to evaluate whether arbitration or common law courts are preferable, they need to be fully aware of these particularities.

Conclusions. There have been several attempts in recent years to promote the use of international arbitration in the banking and financial sector, showing a slow but steady interest. There are several reasons why litigation may continue to be preferred over arbitration, not least because the use of the former is rooted in many areas of the industry, but also because of perceived limitations in arbitration compared to litigation. However, arbitration plays a crucial role in resolving disputes within the international financial-banking system, offering a flexible and efficient alternative to traditional litigation. The complexities and global nature of financial transactions require a dispute resolution mechanism that is both specialized and adaptable, and arbitration adequately meets these requirements. One of the key advantages of arbitration in the international financial-banking context is its ability to provide parties with a neutral and confidential forum to resolve their disputes. Given the sensitive nature of financial matters, parties often prefer to keep their disputes away from public view, saving their reputation and maintaining the confidentiality of held information. Arbitration, conducted behind closed doors, offers a level of confidentiality that is often unattainable in traditional court proceedings.

Recent developments in arbitration practice contribute to some extent in addressing these limitations, and the benefits of arbitration may become more important as counterparties in financial transactions become increasingly diverse. Ultimately, ongoing dialogue between arbitration providers and financial services institutions is essential to ensure that international arbitration can develop to better meet the needs of those users and that they are aware of ongoing developments in international arbitration practice, so as to achieve an optimal solution and informed choice when deciding on dispute resolution options in financial services contracts. Its confidentiality, expertise,

adaptability, and enforceability contribute to making it an indispensable tool for parties navigating the complicated and fast-paced world of international finance. As financial markets continue to evolve, the role of

arbitration is likely to expand, further cementing its place as a cornerstone in dispute resolution in the global financial landscape.

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