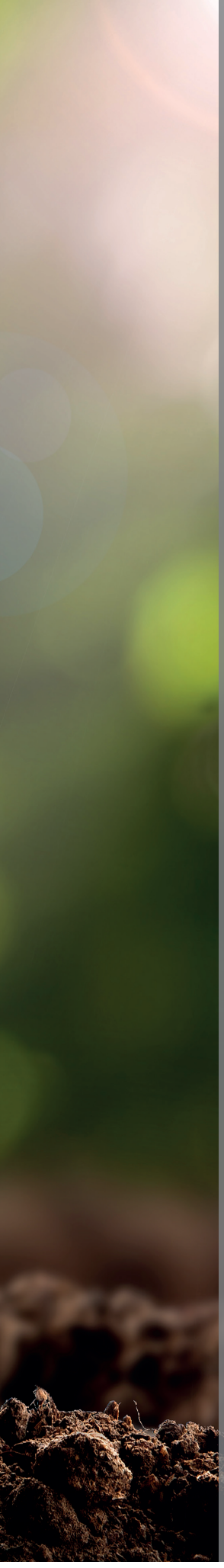
INTERNATIONAL ARBITRATION IN THE FINANCIAL SERVICES SECTOR: ROOM TO GROW?

With international arbitration having enjoyed significant growth as a means of dispute resolution over the past decades, **WilmerHale** partner **Duncan Speller** and associate **Francis Hornyold-Strickland** cast a light on the greater opportunities for its use in the financial services sector



The growth of international arbitration has inevitably led arbitral institutions and practitioners alike to focus on areas where there may be scope for further growth over the years ahead.

One of the main areas that has attracted attention as an opportunity for further growth, and on which international arbitration institutions and practitioners have been astute to focus, is the financial services sector.

Trends on the use of international arbitration in the financial services sector

There have been a number of recent studies on the use of international arbitration in the financial services sector. These studies have tended to reinforce the opportunities for growth.

PriceWaterhouseCoopers' 2013 *International Arbitration Survey* found that only 23% of financial service sector respondents preferred to resolve international disputes through arbitration.

Project finance has seen a growing interest in arbitration, particularly where a party or asset is in a jurisdiction where the courts are perceived as unreliable and no agreement can be reached on the choice of court

The **International Chamber of Commerce** Arbitration and ADR Commission's report into the use of arbitration in the financial sector, published in November 2016, reflected similar findings. It noted that 70% of interviewees were not aware whether their financial institutions had participated in any international arbitrations in the last five years. And only 24% had participated in a small number, resulting in international arbitration representing less than 5% of all financial institutions' disputes.

Behind these statistics, however, the story is more complex and nuanced. It would be wrong to see the financial services sector as monolithically reluctant to resort to international arbitration.

First, within the financial sector itself, the picture is more varied. International arbitration is already more prevalent in some areas of the sector than others. Project finance has seen a growing interest in arbitration, particularly where a party or asset is in a jurisdiction where the courts are perceived as unreliable and no agreement can be reached on the choice of court. Similarly, for derivatives disputes, awareness of arbitration is on the increase and banks have shown a willingness to accept arbitration clauses in their contracts.

Yet despite this growth, arbitration remains under-represented in several areas in the financial sector. International arbitration is relatively untapped as a means of dispute resolution in the Islamic finance sphere. The ICC also noted that arbitration is used minimally in disputes concerning asset management agreements.

Second, even within a particular area of the financial services sector, the advantages of international arbitration may be greater for some transactions and some parties than others. For example, one of the main advantages of international arbitration is the relative ease of enforcing arbitral awards across national boundaries under the 1958 New York Convention.

This advantage is at its greatest when a party may need to enforce an award against a counterparty that has its assets in another jurisdiction that is signatory to the New York Convention. Another advantage of international arbitration is that under many national arbitration rules and laws arbitral awards are confidential (in contrast to many national court proceedings which are public). Some parties attach greater weight to confidentiality than others.

Promoting international arbitration in the financial services sector

There have been at least three recent trends that continue to promote the use of international arbitration in the financial services sector.

Arbitration institutions are giving specific focus to the needs of the financial services sector

A number of arbitration institutions have recently added mechanisms and rules which seek to address the needs of users in the financial services sector. For instance, to address the need for speedier resolution of financial disputes, the **China International Economic and Trade Arbitration Commission** (CIETAC) has recently introduced revised Financial Disputes Arbitration Rules which stipulate condensed timelines for appointing arbitrators, submitting written arguments and issuing final awards in financial disputes.

Other institutions have recently introduced

procedures for the summary disposal of some disputes. Although not exclusively directed towards users in the financial services sector, these innovations address the view that such procedures are particularly useful in some types of financial services disputes. In its 2016 rules, the **Singapore International Arbitration Centre** (SIAC) has introduced a mechanism, Rule 29, for the early dismissal of a claim or defence that is "manifestly without legal merit" or "manifestly outside the Tribunal's jurisdiction"; the **Arbitration Institute of the Stockholm Chamber of Commerce** (SCC) is considering a similar provision for its 2017 rules.

In addition, in April 2015, the London-based Arbitration Club, a not-for-profit body committed to the advancement of and public understanding and use of dispute resolution techniques, created a set of 'bolt-on' arbitration clauses that provide for expedited procedures for financial disputes.

The tendency to resort to national courts in some parts of the sector may have more to do with perception and past practice than a considered assessment of the relative advantages of international arbitration

These include rules providing that the tribunal should expedite proceedings "as much as possible"; that no pleading should exceed 20 single-sided A4 pages, using 12-point Arial; that the time periods between the 'request for arbitration' and 'response' are shortened to seven days, unless the respondent wishes to treat its response as a defence, in which case it has two weeks from the request for arbitration, rather than one (otherwise the defence should be served four weeks after the statement of claim); that any reply should be served two weeks later; and that the reply must also be responsive only to points raised in the defence; in addition the arbitrator(s) must have experience of financial services disputes.

These clauses are compatible with the rules of the **ICC International Court of Arbitration**, **P.R.I.M.E. Finance** (discussed below), the **London Court of International Arbitration**, **Hong Kong International Arbitration Centre** (HKIAC) and the **Swiss Chamber of Commerce**.

Further, the SCC introduced its own 'ISDA-fied' arbitration clause for use with the ISDA Master Agreement. The International Swaps and Derivatives Association (ISDA) Master Agreement accounts for over 90% of global cross-border derivatives transactions, so ISDA-fied arbitration clauses could have significant impact on the sector's uptake of arbitration.

New finance-specific bodies have also been established

In addition to the above, new finance-specific arbitration bodies have been established to ensure that financial sector clients receive the expertise they require for the effective resolution of disputes. One example is P.R.I.M.E. Finance (PRIME), an international arbitration institution in the Hague, for international financial disputes.

Among other things, PRIME publishes a set of arbitration rules tailored to arbitration in the financial services sector. One of those rules provides for anonymized extracts of awards. This is intended to address views that reported precedent has particular value in the financial services sector where many transactions may be based on similarly worded contractual language.

PRIME also draws together a pool of industry experts in banking and finance, who can be appointed as arbitrators. This will be particularly useful for complex disputes, requiring deep industry knowledge.

Since its inception, PRIME appears to be have enjoyed some success in this regard. Within a week, a panel of three PRIME-appointed members resolved a highly time-sensitive case relating to the time at which Caesar Entertainment had gone insolvent triggering pay-outs under credit default swaps amounting to USD 2.9 billion; a testament to the merits of having specialist panels.

Financial institutions are becoming more alive to the benefits of arbitration

Financial institutions also increasingly recognise the benefits of international arbitration and reflect those benefits in the dispute resolution procedures they propose. For instance, in 2013, ISDA itself introduced an *ISDA Arbitration Guide*, which provides several model arbitration clauses that can be incorporated in an ISDA Master Agreement for derivatives trades. In addition, in 2010 and 2012, ISDA included arbitration clauses in its Islamic Finance Tahawwut Master Agreement and its Mubadalatul Arbaah (Profit Rate Swap) Agreement, respectively.

Further, in the United States, the Financial Industry Regulatory Authority (FINRA) now provides a forum for the adjudication of disputes through its arbitration rules and the **Financial Dispute Resolution Centre** (FDRC) in Hong Kong offers mediation and arbitration services for small customer claims.

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Future directions

The increased focus on the financial services sector in the international arbitration community in itself presents an opportunity to promote growth. The tendency to resort to national courts in some parts of the sector may have more to do with perception and past practice than a considered assessment of the relative advantages of international arbitration. Recent developments such as those discussed above help to showcase the advantages of international arbitration to potential users and challenge such perceptions.

The attractions of international arbitration may also be reinforced by broader economic and political developments. One of the main advantages of international arbitration is the relative ease of enforceability across national boundaries in the more than 156 states that are signatories to the New York Convention. This advantage may acquire increasing significance for commercial users.

First, as international finance becomes increasingly global, the advantages of enforceability across national borders become correspondingly greater. For a London bank entering into a loan arrangement with a counterparty in China or Brazil, an award from an arbitral tribunal seated in London is likely to be more straightforward to enforce outside the European Union than an English judgment.

Second, political developments may mean that the advantages of international arbitration have a greater premium compared to the alternatives. In particular, uncertainties surrounding Brexit may create an additional reason why international arbitration is preferable to users in the financial services sector based in London.

Currently Britain is a member of the EU, and is therefore subject to the EU Judgments Regulation 1215/2012. The EU Judgments Regulation provides a framework for the recognition of court judgments issued in one EU member state (such as the United Kingdom), in the courts of another member state.

However, with the UK's impending exit from the EU there is uncertainty over the continued reciprocal recognition of court judgments between the UK and the rest of the EU. Arbitration avoids that problem, as it relies on the New York Convention for recognition and enforceability of awards.

By contrast, there is still no convention that provides for the reciprocal recognition and enforcement of court judgments with anywhere near the same widespread acceptance as the New York Convention. Aside the EU Judgments Regulation, the only other notable international treaties that attempt to do this are the 1971 Hague Convention on the Recognition and Enforcement of Judgments, and the 2005 Hague Convention on Choice of Court Agreements. Yet the 1971 Convention currently has only five parties and the 2005 Convention has only three.

Conclusion

One of the great strengths of international arbitration is its adaptability. Arbitral institutions and practitioners continue to devote significant attention to how that adaptability can be marshalled to meet the needs of users in the financial services sector. That attention, combined with broader geopolitical trends, suggest that there is room to grow over the years ahead.