OPINION

LONDON'S FINANCIAL LIST

A choice of forum crossroads

Simon Bushell of Latham & Watkins discusses the launch of the Financial List and its effect on financial institutions' choice of dispute resolution forum.

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On 1 October 2015, a specialist banking and financial markets dispute resolution forum known as the Financial List came into operation. The Financial List is situated in the Rolls Building in London, and proceedings may be issued in either the Commercial Court or the Chancery Division. London has long enjoyed a pre-eminent reputation for commercial dispute resolution, and the Financial List was no doubt intended to consolidate its position as a key venue for banking litigation. However, the number of claims against banks issued in the High Court has been in decline in the last year.

Perhaps there are fewer claims because the six-year limitation period for claims arising out of the financial crisis of 2008 has expired or, arguably, because banks have become better at managing their exposure to litigation. Another possible explanation, however, is that the number of claims is much the same but the parties have chosen to fight their disputes elsewhere.

Since the financial crisis, the High Court's leading position has been challenged by a number of specialist finance and banking dispute resolution forums that have sprung up around the world. It is therefore unsurprising that the number of bank-related claims before the High Court has started to decline. London's reaction has been slow.

Purpose of the Financial List

When the creation of the Financial List was announced on 8 July 2015, the Lord Chief Justice of England and Wales, Lord Thomas, declared that it would provide the necessary environment for economic activity to thrive. In other words, the new court would give banks and their counterparties a reliable, high-quality and transparent forum in which to hear larger, more significant disputes and would establish much-needed legal and market certainty, in particular regarding complex financial products and related trading.

Lord Thomas was also expressing a confidence that the global banking community and its counterparties would embrace the forum and choose to use it. This raises the important question of who decides whether a dispute is heard in a public court room in London or New York, or is heard confidentially before an arbitral tribunal in the Hague, Geneva, or Singapore? The answer, of course, is largely the banks and their lawyers, and a variety of factors will affect their decision (*see "Making the choice" below*).

Specialist banking forums

There is now a vast number of specialist banking courts and tribunals that financial institutions can opt to use, including PRIME Finance (PRIME), JAMS Financial Markets Group (JAMS), the financial services sector of the American Arbitration Association (AAA), the Banking and Financial Services Committee of the International Institute for Conflict Prevention and Resolution Banking and Financial Services Committee (CPR) and, by no means least, the Singapore International Commercial Court (SICC).

To a large extent, these forums were established in response to specific market needs in different territories. For example, in the US, the vast majority of commercial disputes that come before the court will feature a jury trial. As a result, a large number of financial experts have stepped up to hear these disputes so that financial institutions can avoid the prospect of an emotive and unpredictable approach to decision-making.

Institutional arbitration bodies such as JAMS, CPR and AAA, all of which are US-founded, have lists of financial experts publicised on

their websites. These institutions offer not only financial expertise but all of the benefits more commonly associated with arbitration, such as confidentiality and the worldwide enforcement regime under the New York Convention.

A specific endorsement from the financial markets is a sure way to gain much needed credibility for these alternative forums. Accordingly, much has been made of the decision by the International Swaps and Derivatives Association to create a model arbitration clause giving parties a choice of both PRIME and AAA among the available forums, along with the more traditional English and New York litigation options.

In the Asian market, Singapore has established itself as a major business hub for the region. In doing so, its government recognised the need to actively develop and support Singapore's substantive law and the local legal infrastructure. Efforts have included reinforcing the status and reputation of the SICC to attract the region's companies and those from further afield.

One of Singapore's key strategies was to lure some of the top judicial talent from the commercial courts of other countries. Leading members of the English judiciary have been tempted over to Singapore. The Honourable Justice Bernard Rix, the former Lord Justice of the Court of Appeal and head of the Commercial Court in London, now hears disputes at the SICC. Mr Justice Eder, another prominent judge from the Commercial Court, can also be found hearing disputes in the SICC. The drain of judicial talent has not just been limited to London. The SICC has attracted top judges from Delaware, France, Australia, Japan and Hong Kong.

Making the choice

Faced with these numerous and seemingly viable alternatives, how are the actual choices between the various dispute resolution forums made? The starting point is that the banks are usually in the driving seat, and they will likely stipulate a jurisdiction clause that best suits their needs and priorities. These are likely to be: the quality of decision making and process; the enforceability of the judgment as against the relevant counterparty; costs; and confidentiality.

When considering their forum options, the general tendency among banks and financial institutions in London is to put high-quality decision making ahead of other considerations. One exception to this would be where there is a risk that enforcement will need to take place in a country that does not fall neatly in one of the regimes established by the EU or the Commonwealth under which English judgments are easily recognised and enforced. However, that does not mean to say that concerns over costs efficiencies, the breadth and scope of discovery, and whether the adjudicator has sufficient market experience and understanding, do not come up for regular discussion at the banks. No doubt it is these specific concerns that institutions such as PRIME, in particular, have sought to address.

As for Asia, there is no doubt that Singapore and the SICC are now an obvious alternative to adopting an English law clause coupled with an English High Court jurisdiction clause. This has long been a favoured approach among leading Indian companies, and this trend is creeping into Russia, where the appetite for high-profile disputes in the English High Court has waned.

Confidentiality is one feature of the dispute resolution process that seems paradoxical and sits uncomfortably with high-end financial disputes. While it is often difficult to see how a confidential process can be justified by publicly owned and highly regulated banks and financial institutions, if a confidential approach is desirable and can be justified, arbitration is no longer the only option. The SICC offers a uniquely confidential process in the event that both parties to the dispute consent. While this may be tempting, the consequences of going down this road need to be thought through carefully (*see "A critical juncture" below*).

Market response

The introduction of the Financial List was clearly a sensible move, although arguably rather late in the day. Will the London market, in particular, react positively to this attempt by the High Court to maintain its reputation (or re-establish it, depending on one's perspective)?

The answer is by no means an unequivocal "yes", but there are fundamental reasons why the initiative ought to succeed. In order for a claim to be placed on the Financial List it must either: be worth at least £50 million; require expertise in the financial markets; or raise issues of general importance to the financial markets. Once a claim is listed, one judge will be responsible for hearing the dispute through from pre-trial stages all the way through to enforcement. The Financial List is serviced by 12 specially nominated judges; six from the Commercial Court and six from the Chancery Division.

While a docketed judge certainly drives efficiencies by taking ownership of the case for its life, and the continuity promoted by having a nominated pool of judges is welcome, the blurred distinction between the Commercial Court and Chancery Division is somewhat unhelpful in trying to establish a clearly defined, and marketable, forum.

The Financial List's most compelling feature is its Test Case Scheme (the scheme). The scheme, which is being piloted until September 2017, allows parties to resolve a legal issue on which there is currently no precedent before it becomes an actual dispute. It therefore allows parties to obtain certainty on issues without having to reveal commercially sensitive information, as they may otherwise have to in litigation. In addition, each party to the theoretical dispute will bear its own costs. The question remains whether this will help the High Court to attract an even greater share of major financial disputes.

Implications for financial institutions

In the meantime, there may be some unforeseen and interesting consequences of the advent of the Financial List. Financial institutions need to keep under close review the test cases being heard under the scheme. If they fail to do so, important issues will be decided beneath the radar. In order for a

test case to be heard, there must be mutual agreement between two parties which are or were actively involved in business in the relevant market and which commence proceedings involving an issue of general importance to the financial markets that immediately requires English law guidance. How these safeguards will be applied in the interests of the market as a whole remains to be seen.

The scheme might offer scope to third-party funders and some of the more entrepreneurial litigators in the market to seek judgments and declarations that can be leveraged against financial institutions that are unaware of the test case or are too late to participate in it. The burden of participation is on parties with a vested interest in a test case to join the proceedings and not on the parties that launch the test case. Regulators also have the right to intervene in proceedings.

A critical juncture

Financial institutions are, it seems, at a crossroads when it comes to their dispute resolution options. More than ever, real care and consideration needs to be taken over this decision. The diverse number of interesting and dynamic alternatives may be tempting for some or all of the reasons addressed above. However, every potential eligible dispute that is not referred to the Financial List could undermine the system in which the banks and their advisers have a long-standing vested interest. The financial markets rely on legal certainty, and the ability to apply well-reasoned principles in adapting new products to established laws or established products to new laws. In these respects, they are reliant, if not dependent, on published decisions, precise and clear analysis and judgment, an appeals process, and a healthy and vibrant legal infrastructure, which includes legal advisers, judges, experts, translators and transcribers.

The equation is relatively simple: the more the London markets back the Financial List, the higher the return is likely to be in terms of quality and efficiency. If the Financial List does not take off in popularity and major banking disputes drift off to The Hague, Singapore or elsewhere, we may have only seen the start of the drain of the top judicial and other talent from the London legal market. Financial institutions should therefore consider taking a long-term view on their choice of venue at this critical juncture.

At the time of writing, only two substantive judgments have been handed down and, as of 14 March 2016, no test cases have been launched. That there have only been two substantive judgments handed down to date is not surprising. It will take some time for cases that have found their way onto the Financial List to make their way through to judgment. While these are early days for the Financial List, it very much remains to be seen whether its advent will lead to the High Court re-emerging as the dispute resolution forum of choice for financial institutions. For a host of reasons, I have my fingers crossed.

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