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SETTLEMENT OF DISPUTES IN THE BANKING AND FINANCIAL SECTOR

Abstract

For a long time arbitration has played a rather limited role in banking and finance sector and it has been a preference for resolving arbitration and finance disputes in state courts of important financial centers, such as New York or London. The global economy has experienced extreme stresses in recent years, beginning with the banking crisis of 2007 and the global recession that followed. While financial institutions have in the past relied primarily on litigation to enforce contracts, they are increasingly turning to international arbitration. Today, the traditional reluctance towards arbitration is less prevalent and an alternative means of dispute resolution through arbitration is increasingly gaining importance in banking and finance sector.

Key words: *B2B disputes, ICC, Vienna Rules, New York Convention*

1. Introduction

Litigation has traditionally been the forum of choice for dispute resolution in international finance and banking sector. When parties find themselves in disputes in respect of the investments and contracts that constitute financial trading, there is often a lot at stake, the amount of money at risk is staggering and the interests of many can be affected. The issues contested in these disputes can be complex and financial market disputes that get litigated or arbitrated are rarely "one-shot money disputes" involving straightforward payment claims.

These days finance and banking market are dealing with sometimes multi-party, often multi-contract disputes, involving complex-structured financial products implicating a number of legal relationship that interact

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in complicated ways.[2] Furthermore, because of standardization of documentation, causal sequence for third-party contracts and relationships of any precedents created can be considerable.

The recession and financial crises in the 2000s challenged banks and their litigation culture significantly. Before the crisis, well-run banks will normally be in possession of collateral security before money is made available to lenders or other customers and also the interest rates were appropriate and well above inflation so there was invariably no urgency in resolving disputes quickly and were settled out of court. For that reason, all major banking law academics and practitioners would not consider arbitration, except under exceptional circumstances, clauses in banking or finance contract.

As financial transactions and markets have become more complex and under the current economic consequences as a result of the financial crisis, the number of complex product disputes has also been growing and the choice of the right dispute-resolution mechanism therefore becomes more important for banks and financial institutions.

2. The modern role of arbitration in banking and finance

For many years, banking practitioners have shown aversion towards arbitration and key contracts had historically assumed dispute settlement by domestic courts in the leading financial centers – primarily by London or New York courts. For instance, the ISDA Master Agreement[3] which governs the vast majority of over the country derivatives transactions provides for the exclusive jurisdiction of the state courts of England or New York, depending on whether the parties have stated that English law or New York law is applicable.

Given that both the English and New York courts have extensive experience of effectively and efficiently resolving derivatives disputes,[4] part of the particular interest in New York and English courts (and a

[2] The financial disputes are never as simply as they have been characterised by banking practitioners. When we deeper analysed "simple" financial disputes, a complex legal issues may be raised in a dispute arising out of a loan agreement by a respondent-borrower, such as the compatibility of the grounds for termination embodied in the representations and warranties or covenants with the applicable substantive law.

[3] The ISDA Master Agreement is a master agreement form which can govern multiple derivatives transactions. It is a single agreement consisting of three different components: 1) a printed form of standard provisions; 2) a schedule to the agreement, in which certain variables and elections made by the parties, together with any additional, bilaterally agreed provisions, are set out; c) confirmations relating to individual transactions, where the economic terms of the transactions are set out. The ISDA Master Agreement is widely used as an industry standard and receives considerable attention in all leading treaties on law and practice in the derivatives markets.

[4] Disputes arising out of standard Master Agreements, such as the one used by the International Swaps and Derivatives Association (ISDA), the Master Agreements of the London-based Loan Market Association (LMA) and the New York-based Loan Syndications and Trading Association (LSTA) were also exclusively settled by state courts in London or New York.

limited choice between New York and English Law as the governing law of contract) was assumption that, such uniformity by limiting the parties´ choice in this way, there was increasing probability that industry standard contracts like the ISDA Master Agreement, would represent a comprehensive, uniform and legally enforceable master agreement which will reflect the collective experience of the derivatives industry.[5]

Today, the expending and evolving nature of key element of the financial markets, the widening participation of a range of market players differently situated, and the growing complexity of structured financial products and relevant issues have increase demand to have recourse to arbitration.

3. Advantages of the arbitration process in banking and financial sector

The long list of reasons why arbitration has no place in international banking and financial transactions is constantly repeated by academics and banking practitioners. Those characteristics of arbitration which are usually considered to speak in favor of this dispute-resolution process but often cited as disadvantages of arbitration in this specific industry sector, may vary from party to party and even from transaction to transaction. As explained below, the disadvantages can often be mitigated by the inclusion of additional provisions in the arbitration clause. The remaining chapters will be described the most important reasons why banks and other financial institutions should consider dispute resolution through arbitration.

3.1. Key reasons to choose arbitration

Financial market disputes reflect the realities of financial markets. As financial markets becomes increasingly complex, so do disputes. Because the landscape of international banking and finance has changed, there has also been an evolution in the nature of the issues that come to court in financial market disputes, particularly those arising from trading in complex financial products. Typically, financial disputes involve direct payment claims thus involving simple legal questions and for such disputes, dispute resolution by existing state courts is considered to be better, swifter and simpler by far.

As financial transactions and markets have become more complex, so have the disputes and parties have been bringing to court disputes

[5] The results from leading courts have not been in all cases consistent and significant example of this inconsistency is the differing conclusions of the London and New York courts as to the enforceability of a key provision, Section 2(a) (iii), of the ISDA Master Agreement, the former upholding its enforceability in *Lomas v Firth Rixson*, whilst the latter held that, on the facts of the case, it was unenforceable or at least of limited enforceability in *Metavante.*

involving highly technical issues that comprise specialist knowledge which demands framework in market practice, custom, and usage. It would seem undesirable to expect that the parties in such a situation to seek resolution of the issue in a court of general jurisdiction either a local court where the judges might lack relevant experience in the field of national and international banking and capital market law or especially if it would require sending the parties to a court far away, with logistical and linguistic obstacles, prohibitive expense, and lacking in jurisdiction such that it could render equitable decisions These are situations where an expedited arbitration or mediation[6] might be preferable method of dispute resolution.

The survey in 2013 by the Queen Mary University of London (QMUL) School of International Arbitration and PwC survey on industry perspectives in relation to arbitration confirms that arbitration is more popular in some industry sectors than others, most notably in the Energy and Construction sectors with 84% and 78% of the industry respondents supporting arbitration respectively. According to this 2013 survey, the percentage for banking and finance is quite significant at 69% with less than one quarter of general counsel in banking and finance declaring arbitration to be their most preferred option.[7] According to 2015 survey, 90% of respondents indicated that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%) and the five most preferred and widely used arbitration seats are London, Paris, Hong Kong, Singapore and Geneva.[8]

Given this clear preference of the commercial sector for arbitration as well as a fundamentally changed and more contentious market environment caused by the worldwide financial crisis, advocates for dispute settlement of financial disputes by arbitration point to variety of benefits of arbitration for the resolution of their b2b disputes. That includes measure of procedural flexibility that allows conformity with particular financial market conventions and can meet a need for expedited procedures or confidentiality, avoiding specific legal systems/national courts, selection of arbitrators, neutrality and privacy, ensuring that any decision, judgment, or an award will be upheld in the relevant jurisdiction.

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[6] Mediation differs from arbitration insofar as it generally does not lead to a final and binding decision on the parties. It is focused on enabling parties to reach a settlement through the help of a third party, which will enable them to continue to fulfil their duties under their original contract and thereby maintain ongoing commercial relations. See the 2013 *ISDA Arbitration Guide*, 1

[7] Corporate choices in International Arbitration Industry perspectives, 2013 International Arbitration Survey (Queen Mary College, London) and Pricewaterhouse Coopers (2013), 4

[8] *http://www.arbitration.qmul.ac.uk/,* November 10, 2015

3.2. Scope of Application of the Provisions on Expedited Procedure

Some institutional rules allow arbitration provisions on the accelerated procedure, typically where the amount in dispute is below a certain threshold value, in cases of urgency, or where the parties agree to shorten the timelines. Arbitration provisions on the accelerated procedure is the argument that arbitration does not allow for the speed of decision-making that is required to resolve financial disputes.

Since arbitral proceedings, in legally and/or factually complex cases can take as long as state court proceedings, the duration of proceedings is increasingly cited as a disadvantage of arbitration.[9] All practitioners know that arbitrator selection can be a very expensive and time-consuming endeavor. The selection of the arbitrator is critically important and a decision that can have potentially devastating results to a client. When the solo arbitrator expands to a panel of a three-member arbitral tribunal, the selection and anguish processes increase geometrically.

Hereafter, if a respondent does not participate in the proceedings, the arbitral tribunal may not render a summary judgment and in that case the arbitral tribunal must continue the proceedings without argue such failure (to communicate his statement of advocacy within the set time-limit) in itself as an admission of the claimant's allegations[10]. Even if the respondent is in default, the arbitral tribunal must evaluate the dispute on the basis of the legal arguments and documents submitted by the claimant before rendering an award.

Several important international arbitration institutions offer specific rules for fast track arbitration. The increase in number of arbitral institutions creating such special rules for expedited proceedings demonstrates the "need for speed" in arbitral proceedings.[11]

The most well-known fast track arbitration cases to date were conducted under the rules published by the International Chamber of Commerce (ICC). Although Art 32 of the ICC Rules generally provides for expedited procedures by granting the parties the opportunity to shorten various time limits set out in these rules, the ICC Rules do not contain further detailed regulations in this regard.

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[9] 0 Cf Survey "International Arbitration: Corporate Attitudes and Practices 2006", supra n 9, 7: "A related concern is the time the arbitration process takes from filing to award, which was the second most commonly expressed concern"; see also Survey "International Arbitration: Corporate Attitudes and Practices 2008", supra n 3, 7, stating that 17% of the interviewees indicated their desire "to avoid excessive delay" as the major reason to settle a dispute during arbitration.

[10] Art 25(b) UNCITRAL Model Law; cf Art 28(2) UNCITRAL Arbitration Rules.

[11] For more institutions that have adopted specific rules, see R. Fiebinger, C. Gregorich, "Arbitration on Acid", *Austrian Arbitration Yearbook* 2008, Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds,2008, 237

The German Institution of Arbitration (DIS) has adopted the Supplementary Rules for Expedited Proceedings (DIS-SREP).[12] These new Rules supplement the standard DIS Arbitration Rules. The DIS Arbitration Rules state that the arbitral tribunal must conduct the proceedings expeditiously. The DIS-SREP provide for: dispute resolution by a sole arbitrator as a rule; a limit on the number of briefs exchanged; and proceedings to be concluded within six months.

Vienna rules contain more elaborate section on expediting proceedings and the provisions on expedited proceedings constitute an important amendment to Vienna Rules 2013 compared to the Vienna Rules 2006.[13] The expedited procedure pursuant to Art 45 is not simplified procedure[14] and the parties' right to be heard must be observed to the same extent as in "normal" arbitration proceedings. An arbitral award rendered in expedited proceedings must be reasoned with the same due care as an arbitral award that is rendered in non- expedited proceedings. The purpose of the provisions on expedited procedure is to minimize the duration of the proceedings without reducing the quality of the decision of an arbitral tribunal.

Pursuant to Art 45(1), the provisions on expedited proceedings only apply if they have been agreed by the parties ("opt-in" model). Vienna Rules deliberately do not contain a monetary limit below which the conduct of expedited proceedings is automatic in adversely to the other arbitration rules. Expedited proceedings put higher constraints on the parties and arbitral tribunal and the "opt-model" was chosen because the parties should be free to decide whether a dispute is suitable for expedited proceedings or not. A high amount in dispute does not automatically mean that the proceedings will be more complex, on the contrary, even proceedings with a low amount in dispute may be complex and therefore be considered by the parties to be inapt for an expedited procedure. The agreement on expedited procedure may be concluded at the same time as the arbitration agreement is concluded and the model arbitration clause recommended by the VIAC (Vienna International Arbitral Centre) contains a model clause for an agreement on expedited proceedings.

Since at the time of the conclusion of the agreement the possibility or need for expedited proceedings is often not yet predictable, banks and other financial institutions are advised to adapt the arbitration agreement

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[12] The Rules are available at *http:// www.dis-arb.de,* November 11, 2015.; see for a commentary on the DIS Rules K Böckstiegel, S Kröll and P Nacimiento (eds), Arbitration in Germany, The Model Law in Practice ,The Hague, Verlag Recht und Wirtschaft, 2007, 655ff

[13] The Rules are available at *http://www.viac.eu/en/,* November 11, 2015

[14] Cf.by contrast DIS – Supplementary Rules for Expedited Proceedings (2008), Section 7; „Rules for expedited arbitrations" SCC Rules (The Arbitration Institute of the Stockholm Chamber of Commerce) and the Swiss Rules of Arbitration (2012), Art 42; which allow that the reasons upon which the award is based are stated in a summary form.

by including a right of choice. Under such a clause, a claimant bank could choose, after the dispute has arisen, to pursue its claim in "standard" or in "expedited" arbitration proceedings, both being administered by the same arbitral institution.

Clearly, fast track procedures must be welcomed by both parties as well as the arbitral tribunal, and must be duly supported by the institution which provides the framework for the proceedings, or else they will not be a success. Care should be taken, however, to ensure that all parties are able to present their case, and to avoid unrealistic or inflexible deadlines: if a deadline for rendering an award cannot be extended and is missed, any subsequent award may be vulnerable to challenge.

3.3. The arbitral tribunal's jurisdiction

It is often suggested that arbitration is not convenient for financial disputes because the final decision on the merits is often delayed by preliminary disputes on the jurisdiction of the arbitral tribunal. Awards rendered without jurisdiction have no legitimacy. The absence of jurisdiction is one of the few recognized reasons for a court to set aside or refuse recognition and enforcement of an award.

The tribunal´s jurisdiction depends on the existence of a valid arbitration agreement between the parties that covers in scope the arbitrable dispute before them. It is generally in the interest of the parties and the arbitral tribunal to establish as quickly as possible if the disputes at bar has been properly referred to arbitration. This is a matter of procedural efficiency. Most arbitration rules, encouraged by the vast majority of modern arbitration laws and international instruments, require the respondent to raise any objection as to jurisdiction at the first opportunity in the arbitration proceedings, or else be barred from raising it at all.

It is commonly the case in international commercial practice that little, if any, attention is paid to the drafting of the dispute resolution clause. Typically, these clauses, together with the choice of law provision, are located at the end of the lengthy contract document. Consequently, a poorly drafted "ad hoc" arbitration clause, inserted into the contract at the very last moment of the contract negotiations, when the managers want to close the transactions and commemorate their deal, instead of having to think about potential future disputes between their companies. Often contract drafters have little or no experience in arbitration or they don't include model clause of a leading arbitral institution into their contract. This poses serious problems if a dispute arises between parties but this problem does not stem from an inherent disadvantage of arbitration but rather from the parties' negligent at the drafting stage.

Parties in international contract negotiation should always pay close attention to careful drafting of the dispute resolution clause and using a standard "boilerplate" model clauses of recognized arbitration institutions which serves as an important means of conflict avoidance and they save money and time by providing the required legal certainty with respect to potential disputes about the tribunal's jurisdiction that may arise during the arbitration.

3.4. Arbitrators are required to render decisions in an "independent" or "impartial" manner which offers neutrality in the adjudicative process

The possibility of selecting suitable arbitrators for hearing the parties' case is an advantage not limited to finance and banking disputes. However, next to ensuring (or at least balancing) the deciding forum's independence and impartiality, the free selection of arbitrators adds yet another benefit which makes arbitration the most desirable method of resolving finance and banking disputes at the litigious stage.

Provided that the selection of arbitrators is performed diligently and with due consideration of the individual case, the panel thusly selected may be expected to not only successfully take on the legal challenges of adjudicating disputes of international nature, but to also dispose of the much-needed thorough expert knowledge of the financial background underlying the subject matter.

The UNCITRAL Model Law on International Commercial Arbitration and many national arbitration laws require arbitrators to have a natural tendency to take into account the underlying economic interests of the parties as well as the usages, customs and business practices of the relevant commercial or industrial sector This is one of the crucial advantages of arbitration *vis-à-vis* state proceedings before domestic courts. [15]

3.5. Procedural Flexibility and Party Autonomy

Party autonomy is the fundamental principle of the arbitration which allows the parties to determine all the essential elements of the arbitration and to design the proceedings in advance in accordance with their needs for special experience of the arbitrators, applicable laws, speed and efficiency.

It is often argued that its procedural flexibility and potential disadvantages in many cases is intentional gap[16] in the rules that may lead to

[15] S Kröll, *Schiedsverfahren bei Finanzgeschäften – Mehr Chancen als Risiken, Zeitschrift für bankrecht und bankwirtschaft* (ZBB), 1999

[16] This is particularly so when the parties come from different legal backgrounds and cultures or when one or both of the parties are inexperienced in international arbitration.

an unacceptable degree of legal uncertainty in a financial and capital market transactions, allowing parties many possibilities to delay the proceedings.[17]

Several sets of rules currently exist which reflect globally recognized “best practice standards” and this rules can be incorporated by the parties into their procedural agreements or can be used by arbitral tribunals as guidelines for the exercise of their procedural discretion. The basic are the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules of Evidence”). These IBA Rules contain procedures initially developed in different legal systems and in international arbitration processes. They are a blend of different legal traditions and are intended to govern the taking of evidence in an efficient and economical manner. Parties and arbitral tribunals may adopt the IBA Rules in whole or in part at the time of drafting the arbitration clause in a contract or once arbitration commences or they may use them as guidelines but the Rules do not provide a complete framework for the conduct of international arbitration and the parties must still select another set of rules, institutional or ad hoc, to govern their proceedings.

In October 2014 the IBA Council adopted new guidelines on Conflicts of Interest in International Arbitration. While they are not binding, the Guidelines are intended as an expression of best practices in international arbitration and offer a set of standards seeking to enhance legal certainty and preserve the integrity, transparency and fairness of arbitral proceedings. Arbitral institutions and courts refer to the Guidelines in deciding challenges of arbitrators.

International arbitrators should be impartial, independent, competent, diligent and discreet and IBA Rules of Ethics for International Arbitrators seek to establish the manner in which these abstract qualities may be assessed in practice. They reflect internationally acceptable guidelines developed by practicing lawyers from all continents and they will attain their objectives only if they are applied in good faith.[18]

The Chartered Institute of Arbitrators (London) has developed guidelines for interviewing arbitrators which contains rules for the conduct of interviews with potential arbitrator. [19] The UNCITRAL Notes on Organizing Arbitral Proceedings[20] contain checklists and guidelines for the organization of international arbitration proceedings.

[17] P Wood, *International Loans, Bonds and Securities Regulatio*n, London, Sweet & Maxwell, 1995, margin no 5-60

[18] The rules cannot be directly binding either on arbitrators, or on the parties themselves, unless they are adopted by agreement.

[19] Practice Guideline 16: The Interviewing of Prospective Arbitrators, The Chartered Institute of Arbitrators, 2008.

[20] UNCITRAL Notes on Organizing Arbitral Proceedings 2012 (No legal requirement binding on the arbitrators or the parties is imposed by the Notes)

3.6. The decision of the arbitrator is binding

In a court proceeding, when a judgment is entered against the weight of the evidence, or an error in law is made, an appeal can be had and, if well taken, a new trial order. Similarly, excessive judgments can be reduced. In arbitrations, however, the revision of arbitral awards remains an exceptional remedy which is only available to the parties in extreme circumstances (only a violation of essential principles of arbitral due process, such as the parties' fundamental right to be heard, or of public policy can lead to the annulment of an arbitral award).

The finality of arbitral decision promotes a speedy clarification of the legal issues at stake and resolution of the conflict between the parties and it is consider to be one argument in favor of arbitration which also applies to the financial and capital market sector.

One argument in favor of state court jurisdiction remains: in those rare instances in which banks and other financial institutions take a legal issue to court, they wish to have it determined definitively, if necessary by the highest court, and with effect for the entire sector. On a national level this makes sense for disputes which banks have with their private customers (b2c disputes), in particular if the dispute concerns the interpretation and validity of certain clauses of the standard terms and conditions used by all banks in that country.

However, arbitral awards which have the same effect between parties as state court judgments, may serve as precedents.[21] This is also true for the international banking and financial sector.

The arbitral precedent is a necessity for certain types of disputes because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose. The credibility of the entire dispute resolution system depends on consistency and this presupposes that arbitral awards are published in a specific collection.

In view of the model contracts used on a world-wide level by the Loan Market Association (LMA) or the International Swaps and Derivatives Association (ISDA) there is a strong need for uniform decision-making and publication of such decisions. The Uniform Customs and Practice for Documentary Credits (UCP) is a set of rules on the issuance and use of letters of credit. The UCP is utilized by bankers and commercial parties. This practice has been standardized by the ICC (International Chamber of Commerce).

[21] G K Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" The 2006 Freshfields Lecture, Arbitration International, Vol. 23, No. 3, LCIA 2007.

3.7. Multi-Party and Multi-Contract Arbitration

Not every transaction or contract is executed by two counter-parties. Often there may be one contract but more than two parties ("multi-party"), or a number of contracts possibly involving different parties ("multi-contract").[22] This is typical for joint venture agreements; arbitration clauses contained in articles of association;[23]distribution agreements; construction projects;[24]and many other forms of commercial contracts. As particular form of multiparty –arbitrations, commercial arrangements also give rise to multi-contract arbitration between two or more parties, who have entered into a number of different contracts all providing for arbitration.

The banking and finance sector often question if it is possible to conduct arbitrations in a multiparty context. There is a lot to be said in favor of establishing one tribunal instead of several different ones to settle disputes. First, a single tribunal would gain full knowledge of relevant facts and circumstances of the parties' dispute. Second, to consolidate multiple disputes in one arbitration will often save the parties a significant amount of time and other resources. Third, resolving multi-party disputes in a single forum resolves the risk that different tribunals reach inconsistent or contradictory conclusions with the regard to the same matter.[25]

However, multi-party (and multi-contract) proceedings raise some difficult issues. First, the arbitration agreement must be valid and applicable in scope to all parties to the disputes.[26]Second, all the parties must have been given proper notice of arbitration and have had an equal opportunity to present their cases[27]and finally, all parties must have an equal opportunity to participate in the constitution of the tribunal.[28]

If arbitration is to function as a real alternative for litigation in multi-party and multi-contract situations, it is imperative that the applicable laws and rules provide more satisfactory procedural solutions for issues arising in these contexts. Most institutional arbitration rules nowadays contain provisions which allow an arbitral tribunal to be constituted even if the side

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[22] An example being the chain of contracts required to finance and build a project

[23] J Lew, L.Mistelis, S.Kröl, *Comparative International Arbitration*, The Hague, Kluwer Law International, 2003, para.16-7.

[24] Ch. C Bühring-Uhle, *Arbitration and Mediation in International Business*, Second Revised Edition, Arbitration and Mediation in International Business, Kluwer Law International, 1996, p.65

[25] P. Level, Joinder of Proceedings, "Intervention of Third Parties and Additional Claims and Counterclaims", *ICC Bulletin*, Vol.7, No.2, 1996, 27 et seq.

[26] See Art. V (1)(a) NY Convention, Annex 11

[27] See Art. V (1)(b) NY Convention, Annex 11

[28] See Art. V (1)(d) NY Convention, Annex 11

consisting of more than one party fails to agree on an arbitrator. Securing an effective multiparty proceeding depends on the careful harmonization of the arbitration clauses contained in different but interlinked contracts. This can be done, for example, by including an appropriate arbitration clause in a multiparty contract such as the "terms of agreement" or by forming a single contractual network consisting of various construction and finance agreements for the purpose of project financing.

3.8. Arbitration is confidential

One of the major factors that encourage parties to choose arbitration over litigation for the resolution of disputes is the perceived confidential nature of arbitration proceedings. Confidentiality is core issue in international arbitration law[29]and together with the worldwide enforcement system for foreign arbitral awards established by the New York Convention of 1958, have always been a major reason for parties to agree to arbitration. The concepts of privacy and confidentiality in arbitration are important and interrelated features of international commercial arbitration. Privacy involves arbitration proceedings being private to the disputing parties and to the tribunal and the privacy of arbitration proceedings is concerned with the obligation not to disclose information relating to the content of the arbitration.

Banking practitioners argue that the confidentiality of arbitral proceedings deducts banks of the option of straining additional pressure on defaulting debtors based on unpleasant publicity. It is rarely the case that a banks image may be damaged because of its involvement in a dispute (nowadays, more and more a physiological – rather than pathological – event of any complex business relation). Confidentiality is an important feature and a major advantage of international commercial arbitration, and also it can be advantage for banks and financial institutions.

3.9. Arbitration and State Courts

Arbitration is based on an agreement between the parties and therefore banking practitioners very often criticize the exclusive competence of arbitral tribunals. *De facto,* banks like to keep their dispute-resolution options open and they often agree cumulatively that actions can be brought before courts at the seat of the debtor, the place of contract performance or at other places where the debtor has assets which serves to prevent the debtor, after the arbitration, from misusing the ensuing enforcement proceeding before the state court to cause additional delays.

[29] See Art. 52(a) WIPO (World Intellectual Property Organization)

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, has proven to be "the cornerstone of the international arbitration system"[30] and one of the most successful instruments of international uniform law and essential advantages of arbitration. The New York Convention creates a uniform international framework, which enables parties to international commercial arbitration agreements to enforce foreign arbitral awards with relative ease. Although the prevailing party has to rely too on the courts in the country of the respondent, the procedure for recognition and enforcement is uniform and enables parties to international commercial arbitration agreements to enforce foreign arbitral awards with relative ease.

Enforcement of a foreign award can be refused only in the limited circumstances listed in Article V, which go mainly to procedural defects rather than the substance of the decision. It is particularly due to this possibility of world-wide enforcement that arbitration clauses as primary mechanism of dispute resolution have been included for many years in the loan agreements of international banks such as the World Bank or the European Bank for Reconstruction and Development.

4. Choice of an Adequate Arbitral Institution

A fundamental part of arbitration is the selection of an arbitrators with relevant expert knowledge, as evident as in the field of national and international banking and capital market law. Arbitrators from banking and financial sector have the advantage that they avoid the ramp-up costs required to learn the subject matter of the dispute, and may be better able to understand the parties' positions.

Furthermore, in complex technical and legal issues of capital market transactions (e.g. whether an email is an electronic message for the purpose of satisfying a contractual notice provision;[31] whether the market expectation is that quotations or replacement trade will be provided on a firm or indicative basis;[32] whether and to what extent a party may finally determine default interest consistent with relevant market practice etc.) the relevant expert knowledge of arbitrators selected specifically for this reason is on average higher than that of state court judges. This provides comfort to banks and financial institutions as one of concerns about arbitration was the shortage of finance and banking experts who could also manage a complex financial dispute as arbitrators.

International practice shows a strong tendency towards institutional

[30] Renaud Sorieul, Director UNCITRAL Secretariat

[31] *Greenelose Ltd v National Westminster Bank Plc* (2014) EWHC 1156 (English High Court).

[32] *Goldman Sachs International v Videocon Global Ltd* (2013) EWHC 2843 (Comm) (English High Court)

arbitration and some arbitral institutions with a general mandate for dispute resolution have issued special rules for disputes in the banking and finance sector. Also, there are specialized institutions with an exclusive mandate for dispute resolution in the banking and finance sector.

Some arbitral institutions such as the American Arbitration Association (AAA)[33], and the China International Economic and Trade Arbitration Commission (CIETAC) [34]have issued special rules for arbitration in the banking and finance sector. The European Centre for Financial Dispute Resolution ("EuroArbitration") offers specialized arbitration rules for financial b2b disputes[35], The P.R.I.M.E. Finance Arbitration Rules are based on the UNCITRAL Arbitration rules (as revised in 2010)[36] with an exclusive mandate for the settlement of disputes in the financial and banking sector.[37] The P.R.I.M.E. Finance foundation (Panel of Recognized International Market Experts in Finance includes internationally renowned experts in the field of both finance as well as dispute resolution.) was established with the aim of facilitating dispute settlement, reducing legal uncertainty and fostering stability in the global financial markets. All these rules are used only infrequently by banks and other financial institutions.

5. Conclusion

While the developing trends in international arbitration may not be looked upon by everyone with favor, arbitration is, and will continue to be, the method of choice for obtaining a final resolution of international disputes. For many decades, finance and banking sectors have shown a marked lack of faith in arbitration and had no incentive or particular advantage to utilize private and quicker dispute resolution methods, such as mediation and arbitration.

[33] AAA offers special rules and drafting guides to address banking disputes, especially those involving secured transactions, which are mediated and arbitrated within the context of judicial protections. Other complex financial issues may be resolved by using AAA's Commercial Rules and selecting a neutral from AAA's Commercial Finance Panel of arbitrators and mediators with specialized subject-matter expertise.

[34] According to the CIETAC Financial Disputes Arbitration Rules, unless otherwise agreed by the parties, the arbitral tribunal shall render an arbitral award within 45 working days from the date on which the arbitral tribunal is constituted. At the request of the arbitral tribunal, the Secretary-General of the CIETAC may extend the time period as needed. However, the extension may not exceed 20 working days. The arbitration fee charged for cases applying the Financial Disputes Arbitration Rules is much lower than that in other arbitration cases before the CIETAC

[35] See A. Hirsch, Presentation of Euroarbitration, in European Centre for Financial Dispute Resolution, in 55 ASA Special Series No. 20, 2003.

[36] The P.R.I.M.E. Finance Rules provide for an arbitration institute that will administer the arbitral proceedings, whereas UNCITRAL Rules have been written for *ad hoc* arbitration.

[37] The P.R.I.M.E. Finance dispute resolution services and its Arbitration and Mediation Rules were launched at the opening conference of P.R.I.M.E. Finance in the Peace Palace in The Hague on 16 January 2012.

Geographical expansion of the financial sector, complex markets and financial transactions, product expansion, and an expansion of the universe of market participants on both the buy side and market-making side of the business has resulted a sea-change in thinking towards more flexible and fine-tuned dispute settlement solutions within the finance and banking sectors. Today, a considerable percentage of the cases administered by some arbitral institutions involves international banking and finance disputes.

For an industry that has had in the past aversion towards arbitration and other methods of alternative dispute resolution, it is considerable that 69 percent of financial services sector respondents in a survey held by the Queen Mary College, University of London and Price Waterhouse Coopers, expressed their support for arbitration as an effective dispute resolution process. This change in attitude is reflected in the publication of the 2013 ISDA Arbitration Guide containing model arbitration clauses, as well as the establishment of P.R.I.M.E. Finance which provide a dispute settlement mechanism for disputes relating to financial products, in particular complex financial products such as derivatives.

For finance and banking disputes, the advantages of arbitration today access to the legal and financial market expertise of highly qualified arbitrators selected by the parties; confidentiality of the arbitral procedure; worldwide enforceability of arbitral awards under the 1958 New York Convention; the rules for expedited proceedings ("fast track rules") as well as other advantages of arbitration in finance.

Considering this, the success of arbitration in banking and finance sector will depend in part on whether parties make reasonable progress in drafting feasible arbitration agreements, choosing the right arbitral institutions and arbitrators who are already versed in complex financial transactions (so that the parties only need to explain the facts and can rest assured that the arbitrators understood what was presented) and competitiveness of state courts.

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RJEŠAVANJE SPOROVA U BANKARSKOM I FINANSIJSKOM SEKTORU

Rezime

Dugo vremena arbitraža je imala vrlo ograničenu ulogu u bankarskom i financijskom sektoru, a prednost za rješavanje arbitražnih i financijskih sporova se davala državnim sudovima važnih financijskih centara kao što su New York ili London. Fnancijska kriza koja je poprimila globalne razmjere u posljednjih nekoliko godina, počevši od bankarske krize 2007. godine i globalne recesije koja je uslijedila, uzdrmala je svjetsku ekonomiju. Većina financijskog sektora koji su se u u prošlosti oslanjali na parničenje za provedbu ugovora, sve više se okreću prema međunarodnoj arbitraži. Danas tradicionalna nesklonost prema arbitraži je manje rasprostranjena, a arbitraža , kao alternativni način rješavanja sporova, prihvaćena u gotovo svim zemljama svijeta i njezina se primjena sve više širi u bankarskom i financijskom sektoru.

Ključne riječi: B2B sporovi, ICC, Bečka pravila, Njujorška konvencija.