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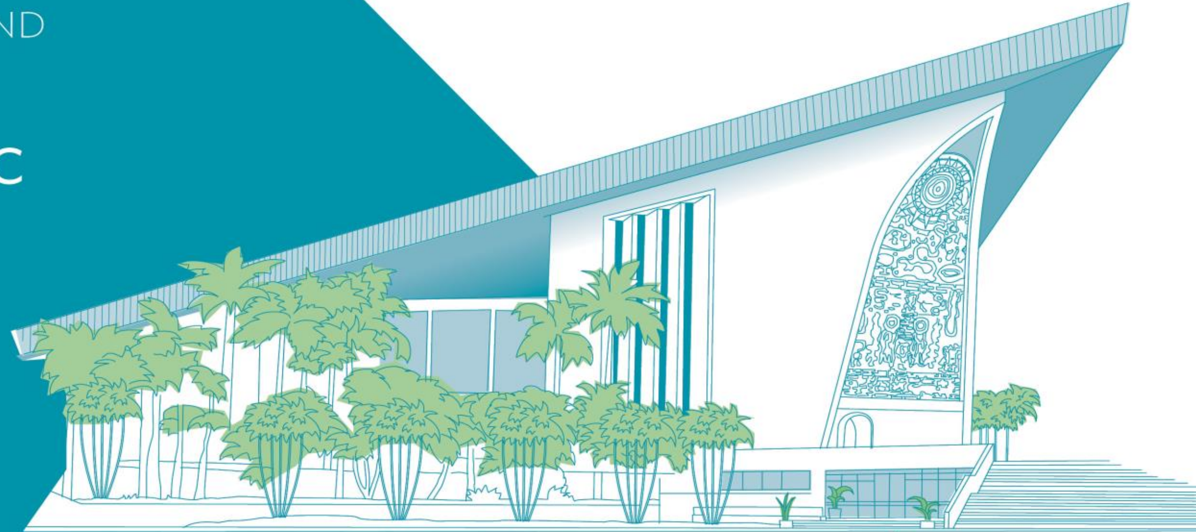

# Arbitrating Financial Disputes

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# Use of Arbitration for Financial Disputes

- Report by ICC Task Force on Financial Institutions and International Arbitration
- Many financial institutions have not used international arbitration to resolve their disputes, choosing instead to litigate in the national courts of financial centers
- Many in the banking and finance sector are unfamiliar with arbitration
- While some banking and financial activities have seen growth in the use of arbitration, others—such as derivatives, advisory services and asset management—have not

# Use of Arbitration for Financial Disputes

- However, financial institutions are using international arbitration in a wide and growing array of transactions in various areas, and with various counterparties
- Following the global financial crisis and the general increase in the number and type of disputes by and against financial institutions:
  - a greater number of arbitration claims involving financial institutions
  - arbitration is increasingly viewed as a viable alternative to litigation

# Specific Initiatives for Arbitration of Financial Disputes

- Industry specific arbitration initiatives:
  - International Swaps and Derivatives Association (ISDA) -- 2013 arbitration guide with model arbitration clauses for ISDA Master Agreement for over-the-counter (OTC) derivatives transactions
  - PRIME Finance launched in 2012
  - Hong Kong's Financial Dispute Resolution Centre (FDRC)
  - Financial Industry Regulatory Authority (FINRA) in the U.S.
  - Specialized rules / centers for Islamic finance disputes
  - ICC Task Force report and follow-up
- Even so, financial institutions still do not use arbitration consistently or on a large scale.

- Perceived advantages of arbitration over litigation:
  - the enforceability of arbitral awards under the New York Convention
  - the ability to appoint arbitrators with specialized financial expertise
  - procedural flexibility which allows financial institutions the ability to tailor the procedures to meet their specific needs
  - the ability to make proceedings confidential
  - the finality of arbitral awards due to the limited right of appeal

# Perceived Disadvantages of Arbitration for Financial Disputes

- Perceived disadvantages of arbitration:
  - the belief that parties need to go to national courts to obtain interim relief before a tribunal is constituted
  - the absence of summary proceedings and the perceived inability of arbitral tribunals to issue a default award when a party fails to appear
  - concerns about the availability of joinder and consolidation in arbitration
  - the uncertainty caused by the inability to establish precedent
  - potentially greater costs
  - the perceived lack of transparency and financial institutions' lack of comfort or familiarity with arbitration
  - limitations on an arbitral tribunal's powers with respect to insolvency proceedings

- Many financial institutions are not aware that some of these perceived disadvantages are addressed in arbitral rules, which often now provide, e.g.:
  - a procedure for the appointment of an emergency arbitrator to consider applications for interim relief before a tribunal is constituted
  - mechanisms for the joinder of additional parties and consolidation of separate proceedings

# When do financial institutions use arbitration?

- Financial institutions tend to favor arbitration over litigation when:
  - the transaction is significant or particularly complex
  - confidentiality is a concern
  - the counterparty is a state-owned entity
  - the counterparty is in a jurisdiction where recognition and enforcement of foreign judgments may be more difficult than arbitral awards

# How do financial institutions approach arbitration?

- When choosing arbitration, financial institutions prefer:
  - institutional arbitration over ad hoc arbitration (e.g., ICC, LCIA, HKIAC, SIAC)
  - major seats (e.g., Geneva, Hong Kong, London, New York, Paris, Singapore)
  - English as the language of the arbitration
  - three-member tribunals, with the president chosen by the party-appointed arbitrators
  - industry expertise and experience, availability and responsiveness, common sense, language skill, independence and impartiality in selecting arbitrators
- Financial institutions do not tend to use:
  - multi-tiered clauses (which require some form of alternative dispute resolution such as mediation or negotiation before a dispute may be submitted to arbitration), although they frequently use mediation without prior contractual commitment
  - asymmetrical or unilateral option clauses (which allow only one of the parties to choose between arbitration or litigation)

# ICC recommendations

- ICC Task Force recommendations for arbitration procedures for financial disputes:
  - adopt methods for reducing time and costs through effective case management
  - use bifurcation and other techniques where it would result in a more efficient resolution of a case
  - provide for a duty of confidentiality
  - make express provision for the availability of summary disposition
  - specify cost shifting rules in arbitration agreements

# ICC recommendations

- Parties should assess potential avenues of recourse under investment treaties as they plan their investments
- Islamic finance and derivatives are potential growth areas for arbitration
- Financial institutions should develop internal policies on the use of international arbitration and preferences for particular terms for arbitration agreements tailored to their particular business
- Financial institutions should assess how to make better use of arbitration through dialogue with trade associations, universities, law firms and arbitral institutions

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