

BANKING AND FINANCE ARBITRATION

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What are banking and finance disputes?

- *ICC Commission Report on Financial Institutions and International Arbitration* (2016) (the ICC Report) identified 9 categories, including:
 - (1) investment
 - (2) derivatives
 - (3) bonds
 - (4) loans and facilities
 - (5) Islamic finance
 - (6) advisory
 - (7) asset management.

Are banking and finance disputes different from other disputes?

(1) technical

(2) regulation

(3) Fintech.

How widely used is arbitration for banking and finance arbitration?

- (1) LCIA 2022 15% of all registered cases (327) were in banking and finance, in 2021 26%, 2020 20%, and in 2019 32%.
- (2) Hong Kong International Arbitration Centre (HKIAC) of in 2022 37% of cases registered (344) involved banking and finance. in 2021 16%, and in 2020 13%.
- (3) China International Economic and Trade Arbitration Commission (CIETAC), in 2020 217 registered cases were in banking and finance (6% of total). Also, CIETAC Financial Dispute Resolution Centre (FDRC) established in 2011. In 2021 it had 42 registered cases (up by 20%). Of the total 62% involved operational issues, 17% misselling, 12% forced liquidation, 12% forced liquidation and 7% misrepresentation.

(1) Special areas

a. Investment treaty arbitrations

b. FINRA – securities arbitrations involving US brokers. In 2022 there were 1055 registered cases, in 2021 there were 1260. Until the end of May 2023 there were 426.

(2) However, the ICC Report task force found “most financial institutions do not have substantial experience of international arbitrations”.

What are the prime issues in relation to banking and finance arbitrations?

(1) Enforceability

- a. Hague Choice of Court Convention 2005
- b. Hague Judgments Convention 2019
- c. Brexit
- d. New York Convention 1959.

(2) Emerging markets

(3) Joinder and consolidation

- a. Rule 22A LCIA Rules

(4) Arbitrability

(5) Summary procedures

a. Rule 9A, B LCIA Rules

(6) Expertise

(7) Flexibility

(8) Speed and cost

(9) Confidentiality

(10) Finality

(11) Asymmetric clauses.

How would a bank or financial institution go about deciding whether or not to negotiate an agreement for arbitration and which one?

- *Stephen Trevis Global Head of Equities, Barclays, Singapore, Negotiating Arbitration Provisions in the Derivatives Context: Perspectives (2018) Klumer*
 - (1) Start with arbitration, LCIA, London seat, English law
 - (2) Risks of other local court interference
 - (3) India counterparties - compromise Singapore seat, SIAC, with English law
 - (4) China counterparties – compromise HKIAC, HK law.
 - (5) Other Asia counterparties – SIAC or HKIAC

(6) Japan

(7) Expertise

(8) Confidentiality.

- *William Park Arbitration of International Business Disputes*

- (1) enforcement of any judgment

- (2) exchange controls

- (3) lender liability

- (4) punitive damages

- (5) summary procedure.

- *ICC Report*

(1) financial institutions tend to prefer arbitration when

- a. transactions complex
- b. confidentiality
- c. counterparty is a state
- d. enforcement of a judgment may be more difficult.

What are the recent developments of relevance?

- *Clauses*

- (1) ISDA model clauses for derivatives arbitrations and arbitration guide launched 2013

- (2) UK Jurisdiction Taskforce, Digital Dispute Resolution Rules 2021 available for crypto assets, cryptocurrency, smart contract, DLT and fintech transactions.

- *Centres*

- (1) PRIME Finance launched 2012 – experts as arbitrators.

- (2) FINRA in USA from 2007. Claims by investors or brokers on brokers in relation to securities.

- (3) HKIAC has Securities Arbitration Rules available for agreement by parties (2% of all cases at HKIAC).

(4) Islamic finance disputes centres launched

- a. in 2007, the International Islamic Center for Reconciliation and Mediation (IICRA), which is based in Dubai, UAE.
- b. In 2008 International Islamic Mediation & Arbitration Centre (IMAC) established by Arab Chamber of Commerce and Industry in HK
- c. In 2021 Asian International Arbitration Centre (previously Kuala Lumpur Regional Centre for Arbitration) published its i-Arbitration Rules for disputes arising out of commercial agreements based on sharia principles.

Particular areas which may see increases in banking and finance arbitration

- (1) Derivatives
- (2) Bonds
- (3) Documentary credits
- (4) Asset management.

How could arbitration of banking and finance arbitrations be improved?

- *ICC Report*

- (1) Negotiating agreements covering expertise/joinder and consolidation/costs/appeals/confidentiality

- (2) Case management and flexibility.