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Insights

SHOULD ARBITRATION BE THE FIRST CHOICE FOR FINANCE SECTOR DISPUTE RESOLUTION?

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SUMMARY

Traditionally, the finance sector has preferred to resolve disputes in the courts rather than in arbitration. Could Brexit, coupled with the new summary determination mechanisms, make arbitration even more attractive to the finance sector?

Banks and financial institutions preferred to resolve disputes in the courts of key financial centres such as London or New York; with arbitration seen as an option for mitigating enforcement risk in emerging market transactions. However, in the last ten years, a clear trend has developed towards a greater acceptance of arbitration with banks and financial institutions increasingly viewing arbitration as an important alternative to litigation.

Two recent developments may make arbitration even more attractive in the financial centre.

Brexit

- Post Brexit, the UK no longer has the benefit of the Brussels Recast Regulation (the reciprocal enforcement of jurisdiction clauses and court judgments) resulting in uncertainty as to whether English court jurisdiction clauses and English court judgments will continue to be respected and enforced by the courts of the remaining EU member states.
- Arbitration is unaffected by Brexit, as the enforcement of arbitration clauses and arbitral awards is regulated by the New York Convention to which the UK is a signatory in its own right. Arbitration clauses selecting England as the seat of arbitration and arbitral awards made in England will continue to be recognised and enforced in the remaining EU member states and vice versa. This makes arbitration an attractive option for parties who are keen to continue to use English law but are concerned about the possibility of having to enforce against assets held in the EU.

The introduction of summary determination procedures in arbitration

- One of the advantages of court proceedings in jurisdictions such as England and New York is the availability of summary judgment. Summary judgment offers a quick and effective mechanism for obtaining judgment in debt actions or actions where a defendant has no defence to the claim and, as a result, is highly valued by banks and financial institutions.

- Several of the major arbitral institutions including the Stockholm Chamber of Commerce, the Singapore and Hong Kong International Arbitration Centres and, most recently, the LCIA, have introduced express provisions allowing for summary determination of claims and defences. For example, the LCIA Arbitration Rules 2020, which came into effect on 1 October 2020, give arbitrators the express power of early determination, allowing them to rule that any claim or defence is manifestly without merit and to issue an award to that effect.

Arbitration is one of the very few things in life that will remain unaffected by Brexit, providing a welcome certainty in an increasingly uncertain world. New summary judgment procedures in arbitration will allow awards to be issued more quickly than before. As arbitration becomes more attractive in a wider range of scenarios, we think it deserves to graduate to a first choice for dispute resolution within the finance sector.

George Burn and Victoria Clark wrote about this in our Emerging Themes in Financial Regulation 2021 publication.

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