

**Insights**

## **TIME TO RECONSIDER? POST-BREXIT, NOW IS A GOOD OPPORTUNITY FOR THE FINANCE SECTOR TO TAKE A SECOND LOOK AT THE KEY BENEFITS ARBITRATION OFFERS TO RESOLVE DISPUTES**

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As we discussed in our It's Good To Talk article as part of our Emerging Themes in Financial Regulation 2021 publication, many banks and financial institutions operating in the UK have historically tended to favour exclusive English Court jurisdiction clauses as their preferred dispute resolution method, particularly when facing EU-based counterparties, given the ease of enforcement through EU Member States. Arbitration clauses have tended to only be used to mitigate enforcement risk when emerging markets are involved.

With arbitration being one of the few areas unaffected by Brexit (the ease of enforcing arbitration agreements and awards internationally, including across the EU, has not changed), Brexit provides a fresh incentive for the finance sector to take a second look at arbitration. Arbitration offers its users many benefits, but there are key draws that should be of particular interest to banks and financial institutions, some of which we cover here.

### **ABILITY TO SELECT ARBITRATORS WITH THE RIGHT EXPERTISE**

Of equal value to confidentiality, the ability for a party to choose an arbitrator to hear its dispute is another strong attraction of arbitration. In arbitration, a party has the opportunity to consider the nature of the dispute that has arisen and the experience and sector knowledge that it would be beneficial for an arbitrator to have in determining the dispute, so that they can choose the best candidate with the right expertise. A party could select an arbitrator from the finance sector with specific technical knowledge and experience, or an arbitrator from a legal background who is experienced in resolving banking and finance disputes. This feature is highly valued by most parties.

If selecting an arbitrator is a daunting prospect, help is at hand. Arbitral institutions have lots of experience in appointing arbitrators suitable for the relevant dispute. Of particular interest in this regard is P.R.I.M.E. Finance, the Panel of Recognised International Market Experts in Finance. Launched in 2012, P.R.I.M.E Finance offers a specialised forum for resolving banking and finance

disputes and they have their own arbitration rules, based on the UNCITRAL arbitration rules. The rules are currently under review, with a draft published for public comment. The public consultation closed on 22 March 2021 and the latest version of the rules is expected to be published shortly. One of P.R.I.M.E. Finance's key selling points is its pool of over 200 legal and financial experts from which to choose arbitrators. You are not tied to choosing from that pool, but if you're not sure who to select as arbitrator, it is a good place to start. These arbitrators are not exclusive to P.R.I.M.E. and you could nominate them if you were using different arbitration rules. At least on the UK side, the pool mainly seems to be drawn from the legal sector, although P.R.I.M.E. Finance's description of the panel says that the pool also includes central bankers, regulators and derivatives market participants. The P.R.I.M.E. Finance Rules are not used as often as other institutional arbitration rules, but are worth bearing in mind.

## MINIMISED RISK OF PARALLEL PROCEEDINGS

Banks and financial institutions are often concerned about the prospect of parallel proceedings in different jurisdictions, particularly in more complex transactions, such as in a typical project finance deal, where there are multiple contracts between multiple parties, which relate to the same transaction or series of transactions.

While it is generally easier to join third parties to proceedings in court litigation, it is less of a concern in arbitration, as many arbitration rules now include enhanced joinder and consolidation provisions. Joinder provisions typically allow a third party to be brought into a dispute at the request of a party, provided that the third party and the applicant party consent in writing. Arbitral tribunals also often have the power, in certain circumstances, to consolidate two or more sets of arbitration proceedings to form a single set of proceedings, so that a single tribunal will determine all the issues, avoiding the risk of inconsistent outcomes in different jurisdictions. This can usually be done when there is a series of related transactions and the documents all contain an arbitration agreement in substantially the same form. The LCIA Rules 2020, in particular, go quite far regarding the consolidation of multiple proceedings, as they allow a tribunal to consolidate an arbitration with one or more other arbitrations even if the arbitration agreement is between different parties, but arises out of the same transaction or series of related transactions.

If the possibility of parallel proceedings is a particular concern, arbitration could be reserved for transactions where there are only two parties, in order to avoid any risk.

## SUMMARY JUDGMENT

As we considered in our It's Good To Talk article, several of the major arbitral institutions have introduced express provisions allowing for summary determination of claims and defences, allowing arbitrators to rule that any claim or defence is manifestly without merit and to issue an award to that effect more quickly than before. This is a significant change and should make arbitration more attractive to banks and financial institutions, who value quick mechanisms for

certain types of dispute, such as debt actions. This development puts arbitration on a more level playing field with court proceedings, where summary judgments are commonplace.

## CONCLUSION

With Brexit providing a fresh impetus to reconsider your dispute resolution methods of choice, the advantages that arbitration can offer banks and financial institutions should be carefully considered to see if it is time for a change. We have already seen significant growth in the use of arbitration by this sector, and recent developments indicate that this is a trend that is set to continue.

## RELATED CAPABILITIES

- Litigation & Dispute Resolution
- International Arbitration

## MEET THE TEAM



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