Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What Financial Institutions Think Of Int'l Arbitration

By **Claudia Salomon, Latham & Watkins LLP**

Law360, New York (November 18, 2016, 4:57 PM EST) --
On Nov. 9, 2016, the ICC Commission on Arbitration and ADR's Task Force on Financial Institutions and International Arbitration released the results of a two-year study regarding the advantages of arbitrating disputes involving financial institutions. The report synthesizes detailed feedback from interviews with more than 50 financial institutions around the world about their experience with international arbitration.

Claudia Salomon

The task force examined a wide range of banking and financial activities, whether undertaken by licensed banks or by funds (equity, investment or sovereign wealth), including arbitration in derivatives, sovereign lending, regulatory matters, international financing, trade finance, Islamic finance disputes, advisory matters, asset management and interbank disputes.[1] The task force also analyzed both international commercial and investment arbitration.

The key findings are as follows:

The task force found that financial institutions do use international arbitration — in a broad array of banking and financial transactions — but not to its full potential. However, arbitration is increasingly a part of the strategic options considered for cross-border banking and financial disputes.

Historically, financial institutions have preferred national courts in key financial centres (i.e. New York, London, Frankfurt, Hong Kong), but have sought to avoid the courts in emerging markets. However, the changing regulatory environment and the nature of the financial disputes that have arisen in the wake of the global financial crisis of 2008 have led financial institutions increasingly to view international arbitration as an important alternative to litigation.

Financial institutions tend to use international arbitration when: (i) the transaction is particularly complex; (ii) confidentiality is a concern; (iii) the counterparty is a state-owned entity; or (iv) the counterparty is in a jurisdiction where the enforcement of an arbitral award under the New York Convention will be easier than enforcement of a court judgment.

Arbitration Preferences

The task force found that financial institutions expressed the following key preferences when opting for international arbitration:

Ad hoc vs. Institutional Arbitration

Most of the financial institutions interviewed preferred institutional arbitration, rather than ad hoc arbitration. ICC, London Court of International Arbitration, Hong Kong International Arbitration Center and Singapore International Arbitration Center rules are most frequently selected, although ad hoc proceedings under the UNCITRAL rules have occasionally been chosen.

Seat

The arbitration seats selected most frequently are, in alphabetical order, Geneva, Hong Kong, London, New York, Paris and Singapore.

Number and Qualification of Arbitrators

Financial institutions generally prefer three-member tribunals, except for more straightforward matters when a sole arbitrator may be appropriate. When selecting an arbitrator, financial institutions consider industry expertise and experience, availability and responsiveness, common sense, language skills, and independence and impartiality.

Multitier and Unilateral Clauses

Multitiered clauses (involving negotiation or mediation before arbitration) are rarely used in agreements involving financial institutions. Unilateral clauses are still viewed as important by a number of financial institutions which consider that litigation provides them with greater legal certainty.

Appeals

Most financial institutions perceive the finality of an award in arbitration and the limited grounds for challenge to be an advantage compared to litigation. However, a minority of financial institutions wish to have a means of appeal in arbitration, provided this does not undermine certainty, and there is an upfront agreement between the parties addressing the circumstances in which a party could appeal and the parties have an agreement as to the overall timing.

Perceptions About International Arbitration

Financial institutions perceive the enforceability of awards in over 160 jurisdictions under the New York Convention as a key advantage. For loans and financing in developing markets, one institution reported that rating agencies look more favorably upon transaction documentation that contains an arbitration agreement rather than a jurisdiction clause submitting disputes to state courts. Other advantages of international arbitration include: the ability to appoint arbitrators with sector-specific expertise, the flexibility of the process, neutrality, finality and confidentiality. Although confidentiality is also considered undesirable in certain banking activities, such as derivatives and syndicated lending, where financial institutions seek standardization.

Recommendations

The report includes numerous recommendations for tailoring the arbitration procedure to suit the needs of the banking and finance sector, specifying that legal advice should be sought in each case.

The recommendations include ways to reduce time and costs; expressly empower the tribunal to consider dispositive issues or claims and defences on a summary basis; specify that the arbitration shall remain confidential; specify that the arbitrators must have particular expertise relating to the financial sector generally, or a specific financial instrument; address the parties' rights to obtain interim relief; address joinder of parties and consolidation of claims under multiple contracts; allocate costs; provide for appellate review; and assess avenues of recourse under investment treaties.

The report also recommended that financial institutions develop their own set of internal policies regarding the use of international arbitration and their preferred ingredients of an arbitration agreement, tailored to the particular circumstances and segments of their business.

The full report is available for download from the ICC website.

Claudia T. Salomon is a partner in Latham & Watkins LLP's New York office and global co-chair of the firm's international arbitration practice. She served as co-chair of ICC's Task Force on Financial Institutions and International Arbitration.

[1] The Task Force did not consider consumer agreements, mortgage lending, insurance and third-party financing of litigation/arbitration.
