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Using Arbitration to Resolve International Financing Disputes

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Parties to international financial transactions have, subject to limited exceptions, historically been reticent to choose international arbitration as a means of dispute resolution in their agreements. In recent years, however, recourse to arbitration in such transactions has been on the rise. The ICC's "Task Force on Financial Institutions and International Arbitration" recently published a report exploring and challenging the historical preference for litigation before national courts and analyzing the nascent trend in favor of arbitration.[1] The findings of the Task Force's Work Stream focusing on "International Financing", co-led by the author of this alert,[2] are briefly presented herein. They are a must-read for anyone involved or interested in international financing transactions.[3]

Scope of the "International Financing" Work Stream

International Financing encompasses a broad scope of transactions where the parties and/or assets are located in several countries, including bilateral and syndicated lending transactions (secured and unsecured), asset finance, project finance and trade finance. The aim of our stream of the Task Force was to identify current trends in dispute resolution in international financing and to assess the effectiveness of arbitration to resolve disputes arising out of international financing.

Historical Reticence

The Task Force's survey of financial institutions revealed, as was already well known to all members of the stream, that there has been a historical reticence to relying on arbitration as a means for resolving international financing disputes. Within the different types of transactions, we noted a stronger resistance to using arbitration in the syndicated lending and asset finance sectors than in project finance transactions. This resistance stems largely from cultural factors and has been fueled by inertia and standardized documentation.

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1 The "Task Force on Financial Institutions and International Arbitration" was constituted in 2014 under the aegis of the International Chamber of Commerce and has performed a detailed survey and analysis of current practices in international financial transactions. Its report can be found here: http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2016/Financial-Institutions-and-International-Arbitration-ICC-Arbitration-ADR-Commission-Report/

2 The Work Stream was led by White & Case partner, Charles Nairac, with Jean-François Adelle of Paris law firm Jeantet & Associés.

3 This summary was first published on *Kluwer*'s Arbitration Blog (http://kluwerarbitrationblog.com/2016/12/23/using-arbitration-to-resolve-international-financing-disputes/), where further posts can be found presenting the work of the Task Force.

Apart from this reticence, some financial institutions also cited the unsuitability of arbitration to cater to the requirements of financial disputes (particularly the restricted range of available interim measures) and its inability to generate binding legal precedents.

This historical resistance has been exacerbated in the arena of secured transactions, due to the uncertainty of enforceability of security rights over assets through arbitration. Court intervention was viewed as somewhat preordained and recourse to arbitration was perceived to be an exercise in futility. Although often unfounded, the belief in such practical inarbitrability of security agreements continues. It is correct that, for those security rights whose enforcement requires the intervention of a court (if not enforced voluntarily), it will not make sense to choose arbitration as a means of dispute resolution. But whenever the security at issue is self-enforcing, there is no inherent reason for disputes arising out of such security to be referred to a national court as opposed to an arbitral tribunal.

Concerns have occasionally been voiced that arbitration may result in short-circuiting third party rights, especially in the context of insolvency proceedings. That concern is baseless. The decisions rendered by arbitral tribunals will always be subject to compliance with the decisions of the insolvency court on matters over which it has mandatory and exclusive jurisdiction, such as the validity of security posted during the lookback period and the approval of the statement of secured claims, and with the timetable of the insolvency proceedings.

Mapping the change in trends

The trend has however begun to shift away from the historical resistance to arbitration. Indeed the Task Force stream found that arbitration is increasingly used, as opposed to court litigation, where parties and assets are subject to courts that are perceived as inadequate for the protection and enforcement of the financier's rights, and no agreement can be reached on the choice of a court deemed acceptable by the parties. This was especially true for project finance transactions, as well as for financing transactions in general, centered in Latin America, CIS or Africa, and for transactions involving State or State sector entities as counter-parties. It was also noted that self-enforcement is an increasingly available option in security laws and when the intervention of a court remains necessary, it is restricted to secured asset enforcement issues as opposed to adjudication on the secured claim.

Although no marked preference for either arbitration or litigation was found in trade finance, there is a growing recognition that court litigation is not the most suitable forum for resolving disputes in such transactions and that arbitration is capable of being tailored to specific contexts.

What does arbitration have to offer?

The ease of enforceability of an arbitral award across jurisdictions due to the popularity of the New York Convention, 1958 is a key advantage offered by arbitration.

In addition, arbitration offers the benefits of expert decision-making in complex disputes, flexibility, neutrality, and a confidentiality regime which the parties can design according to their needs and preferences (ranging from the fullest confidentiality extending even to the mere existence of the proceedings, to a regime of full publicity). Arbitration can also offer the advantage of avoiding fragmentation of remedies across multiple court fora, by providing the option for financiers to enter into multiparty dispute resolution mechanisms and/or consolidation of arbitral proceedings. Arbitration also provides the parties the flexibility to be able to isolate and segregate issues into separate proceedings, for example separating reimbursement actions from disputes relating to commercial contracts entered into by the project company.

Whither Litigation?

What does the (admittedly timid but nevertheless real) change in trend indicate for the future of dispute resolution in international financing? As pointed out above, arbitration is likely to continue to attract users where there are qualitative concerns about the national courts available as alternatives to arbitration. Whether the parties choose arbitration or litigation will depend on which mode of dispute resolution is more suitable for the specific transaction at issue, especially in light of the parties involved and an assessment of the available alternatives. In many cases, arbitration will prove to be a very attractive option.

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