Banking and finance disputes: to arbitrate or not to arbitrate, that is the question

Nicolas Ollivier | Caroline dos Santos*

"It has been said that "[b]ankers have traditionally preferred judges to arbitrators". Indeed, where banks or financial institutions are involved in a dispute, state courts have usually been preferred, while arbitration has, so far, often been overlooked. However, in the last decade, the financial landscape has endured colossal changes worldwide. The 2008 crisis led to a paradigm shift. Banks – and notably Swiss banks – have suffered the hostility of certain jurisdictions' national justice systems, while also enduring increasing regulatory burdens. Fintech startups are also remodeling the traditional ways banks have made business and creating some competition while bringing new legal challenges. The COVID-19 pandemic is still currently affecting every region of the globe, disrupting economic growth and foreshadowing a severe global recession. Banks already experience an increase of disputes. In the context of this new décor, it is the opportunity to forget preconceived ideas and to reconsider arbitration as a dispute resolution method. This contribution sheds light on the common – but often unjustified – criticisms that have traditionally been made against arbitration in this field, as well as the reasons for the recent growing interest it has generated. The benefits of arbitration as a dispute resolution method for specific activities of the industry will be discussed, without any preconceived ideas. As will be seen, while arbitration will not be a "one fits all" solution for all types of banking and finance disputes, it may provide unexpected benefits for banks and financial institutions, such as derivatives, advisory work, M&A, and smart contracts.

Table of contents

I. Introduction

"The world of arbitration and the world of banking are apart. Arbitration practitioners consider bankers as being most ungrateful for not showing more gratitude to the many advantages that arbitration offers. […] *Conversely, bankers reproach arbitrators for not understanding the basics of a banker's business".*[1]

In the last few decades, arbitration has become the worldwide method for dispute settlement. Surveys show that, in case of disputes, for some industries, the use of arbitration has become more mainstream than recourse to court litigation.[2] There is, however, a stark contrast when one looks at the banking and finance sector where only 23% of its stake-

* *Nicolas Ollivier* is Counsel in a law firm in Geneva in the litigation department and specializes in banking law. *Caroline dos Santos* is a Swiss-trained lawyer, associate at a law firm in Geneva; her main area of practice is international commercial arbitration.

1 *G. Affaki,* A Banker's Approach to Arbitration, *in* G. Kaufmann-Kohler/V. Frossard (eds) Arbitration in Banking and Financial Matters, ASA Special Series No. 20, Basel 2003, p. 63.

2 Respectively 68% and 56% of respondents from the construction and energy sectors consider international arbitration as their "*most preferred*" method to resolve cross border disputes. See Queen Mary University of London and PricewaterhouseCoopers LLP, Corporate Choices in International Arbitration: Industry Perspectives, Queen Mary University of London and PricewaterhouseCoopers LLP, 2013, p. 6, available at: <*https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf*>.