

Taylor Wessing survey reveals the future of global dispute resolution

Earlier this year, Taylor Wessing undertook a survey to study the impact of the economic downturn on dispute resolution around the world. Several hundred responses were received from companies and lawyers worldwide on their current attitudes to a number of dispute resolution issues including:

- the use and merits of litigation as opposed to arbitration
- the popularity and effectiveness of ADR
- costs
- a global ranking of over twenty jurisdictions on a variety of measures including expense, independence of decision makers and adequacy of a clear body of law.

While not aimed only at respondents in the financial services industry, it is instructive to compare and contrast the results of the survey with our experience of financial disputes. In this context, two key themes emerge. First, the inter-relation between arbitration and litigation and the suitability of arbitration for financial disputes, and second, attitudes to mediation in the financial services industry.

The survey results – general trends

Unsurprisingly, 60% of respondents thought that the volume of disputes work would increase in the next 12 months, with only 2% forecasting a decline. As between litigation and arbitration, litigation remains the more widely used dispute resolution mechanism, with just under half of respondents referring at least 75% of their disputes to litigation, 27% of respondents referring roughly half of their disputes to litigation and half to arbitration, and only 17% of respondents referring at least 75% of their disputes to arbitration. The general expectation among respondents was that the extent of their use of arbitration would increase slightly or remain the same over the next five years.

Financial disputes and arbitration – right of appeal?

The survey showed a slight preference for arbitration over litigation as a method of dispute resolution, even though in practice most respondents handled more litigation than arbitration. As mentioned, more respondents expected their use of arbitration over the next five years to increase rather than decrease. However, when questioned as to why respondents preferred litigation over arbitration, 17% of respondents said that rights of appeal are important in litigation, as against only 12% of respondents who said that the reason they preferred arbitration was because it offered finality.

While this may not seem to be a large proportion of respondents highlighting the importance of appeals in litigation, when questioned as to whether the "English-style" right of appeal in arbitration is a good thing, 47% said that it was, 30% were neutral and only 24% viewed it as a bad thing. However, the English-style right of appeal afforded by the Arbitration Act is extremely limited, only applying in relation to (1) challenging the tribunal's substantive jurisdiction, (2) serious irregularity affecting the tribunal, the proceedings or the award, or (3) questions of law. Even then, the right of appeal in relation to questions of law only applies if all the parties agree or the court grants permission to appeal, so absent agreement there is no automatic right of appeal.

It would seem to be a commonly held view that, the limited rights of appeal means that arbitration may not lend itself to disputes between financial institutions and borrowers, especially where the likely disputes are likely to be, in practice, debt recovery actions rather than a contest between finely balanced legal and factual arguments between sophisticated counterparties. The risk of an adverse decision with either large sums at stake or the risk of a decision which would impact a large number of positions held by the entity in question, means, in our experience, that many financial institutions are unwilling to risk using a decision-making body which may come to the 'wrong' conclusion with very limited rights of appeal. This is borne out in practice as the majority of dispute resolution clauses in the documents forming the basis of the financial disputes provide for recourse to the courts not arbitration. The one area in financial services where we do see more arbitration clauses is private wealth disputes, where the sums at stake tend to be smaller than wholesale market disputes and where privacy, confidentiality and a lack of precedent are valued.

One alternative which might make arbitration more attractive in financial disputes would be if parties were able to agree when entering into a contract a wider right of appeal. However, to be effective notwithstanding the appeal provisions of the Arbitration Act, any such clause would need to be carefully drafted.

Mediation and financial disputes

The survey found that the view of respondents to mediation was generally very positive. Just over 70% of respondents said that they had experience of referring disputes to mediation prior to commencing litigation or arbitration, 65% during the course of litigation/arbitration and some 40% by order of the court or tribunal during litigation/arbitration. A significant majority of respondents found that mediation resulted in the settlement of disputes (43% found that over 70% of disputes referred to mediation settled and a further 33% found that 30% to 70% of disputes referred to mediation settled). In addition, the attitude to mediation was generally also positive. 34% of respondents had a very positive view of mediation, and 58% had a mixed opinion depending on the suitability of the case in question for mediation. Only 8% had a negative view of mediation.

However, it is still comparatively rare to see contractual mediation clauses in financial agreements. This is perhaps surprising. While sophisticated financial institutions may not want to be forced to go through a process of mediation prior to the commencement of proceedings, some types of transactions involving the joint efforts of the parties may benefit from a dispute resolution clause that encourages mediation before the parties litigate. Although, of course, there is nothing to prevent such parties settling the dispute without the necessity of mediation, there is an argument that a contractual obligation to mediate or, alternatively, convene a settlement meeting of senior representatives may be the catalyst for accelerating a negotiation which is likely at some point to take place anyway.

One reason why it is still relatively rare to see contractual mediation clauses may be that, in international transactions, one of the parties may be based in a jurisdiction where mediation is not yet generally accepted as a method of dispute resolution, for example in Italy. In some non-common law jurisdictions, mediation is still viewed with scepticism and parties in common law jurisdictions can often have difficulty in persuading parties who are not used to mediation that it is a worthwhile exercise. Having said that, in our experience, it has long been the case that banks (and other financial institutions) in so-called "bank-to-bank" disputes, instead of immediately issuing proceedings, attempt on one or more occasions to settle a dispute without recourse to litigation or arbitration, with mediation being more popular than it might previously have been. Particularly when legal budgets are tight, in our experience, financial institutions are embracing mediation more and more and seeing that, if it is used in appropriate disputes with the right mediator and the right approach, it can result in an inexpensive and satisfactory settlement.

Further information

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The Taylor Wessing Global Dispute Resolution Report is available online at www.taylorwessing.com/disputessurvey



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