Arbitral Actuary In Finance Disputes- A Love-Hate Tale

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Arbitration in Financial Disputes: A Perfect Means of Dispute Resolution for the Modern Times

Bottom Up Or Top Down?

When we talk of a financial dispute, the first thing that brings to understanding is some such aspect which relates to a bank. Litigation has always been the go-to since time immemorial. However, since globalization, the core involvement of parties has led to international arbitration as a means of resolving a financial dispute. The resultant of this aspect has led to the birth of many such misconceptions which financial institutions consider to be a giveaway understanding of the vast scope of banking and finance disputes. The finance sector hadn't and till date hasn't nuzzled up the dogma of international arbitration as a means towards solving disputes, until recently.

The new currents passing through the already troubled waters of the banking and finance sector show a tremendous increase in why arbitration over litigation has been chosen to solve such disputes. Financial models and financial markets tentatively become loggerheads because of the mechanized calculations that follow in different agreements like that of an ISDA Master Agreement. Arbitration falls into place as banks consider that not all national courts are capable of taking such decisions. The arbitration mechanism gives involved parties the autonomy to choose their decision makers which in turn avoids precedent creation.

The Big Bank Mix-Up

Banks and financial institutions have many pre-conceived notions about arbitration which has widened the gap enough, to not acclimatize themselves to a new change. We speak change through arbitration as a means. Banks have opined that arbitration is final because of the binding rights that cannot be waived via the agreement in place. Institutional arbitration often foils the allowance of an appeal on factual merits, not mandatorily but still. Banks have it fitted that the parties have to first exhaust all appeal processes within the limited option of arbitration and often by habit resort to litigation as a mode of easy escape.

Banks have also come to understand that arbitration is not going to provide them with the liberty of summary judgments like litigation does. For smaller issues like debt claims, they prefer litigation as they assume that summary

procedures are not an option of arbitration. A profound study into the field of arbitration does give a selection similar to that of summary procedures if incorporated in the arbitration rules or by party autonomy. Party autonomy is self-explanatory in a way that it allows the parties to choose how they would like their claims to be treated.

Another pre-conception that banks and financial institutions own is that, they think arbitration lacks the idea of interim relief and that courts are the only recourse to the fulfillment of interim needs. Arbitration has upped its game in terms of incorporating the knowledge of the appointment of an emergency arbitrator to provide for interim injunctions on an urgent basis. For example, tribunals have wider scope in terms of power towards granting interim relief thereby renouncing access and involvement of state courts. While interim relief drawn through court help is a more looked-for option in comparison to the alternative of arbitration, courts are more than willing to overlook the proceedings leaving no hang-ups of having chosen the latter.

Confidentiality is a preconceived notion that most banks and financial institutions have. They think that arbitration is private but that’s not the case unless expressly mentioned in the underlying clause. Party autonomy and consent is the driving force behind the publishing of an arbitral award. It works in accordance with the choice of the parties. For example, most awards that are published by ICC or Stockholm Chambers of Commerce have the names of the parties removed and only the reasoning made available for viewing.

One of the last pre-conceived notions financial institutions have is about flexibility. Financial institutions often want the plasticity of being able to use both litigation and arbitration. They showcase some amount of skepticism in terms of legal certainty. They are able to do so by use of what one calls an asymmetric clause. The inclusion of an asymmetric clause is basically viewed and understood as using a mix of both litigation and arbitration to draw conclusions to a dispute. Indian Law is yet to make the forlorn asymmetric clause an inclusive part of an agreement, although loan agreements do have asymmetric clauses as a part of them and English Law explicitly has no problem.

Arbitrate To Move The Clocks Away From Litigation: Possible?

There are pros and cons to every dealt aspect and dispute on the table. A question of consideration at this point would be, will arbitration as a means be a prosperous bet in comparison to litigation? Banks deal with counterparties from emergent markets and these parties would be more than happy to not submit them to English courts but to locations best suited to them. At this point, it would be easy to say that arbitration offers neutrality in a way that allows parties to choose their seat and place of arbitration.

Another advantage of arbitration that can be harped on is that of expertise. National courts definitely are not capable enough to deal with complex financial products off-hand, while in arbitration parties have the freedom to choose their arbitrator who may have expertise in a particular field thereby bringing ease to execution and passing of the award.

Confidentiality is definitely abound blessing in arbitration, the same of which acts as a bane in litigation as proceedings are open to the public. Privacy can be demanded in the arbitrational rules, with regards to the documents and award. Other recompenses may include flexibility and finality which is not so easily available when it’s court litigation. Arbitration is

tailor-made to suit the parties' needs. Last but not least is the enforcement. It is definitely way easier to enforce an award as against a court judgment, subject to the seat of arbitration being a country that is a signatory to the convention. This is so because then it becomes easier to enforce the award in any country per se.

Concluding In The Parallel Universe

In many ways, arbitration is a universal & powerful implement at the disposal of a banking and finance dispute. The flexibility and finality aspect, enforcement, and neutrality are smart bargains, subject to an arbitration agreement being drafted accurately so as to maximize the best. Where arbitration can be a magic bullet, it can also be an absolute lapse if not worked around appropriately. In addition, the key to proper case management lies in a well-held tribunal.

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