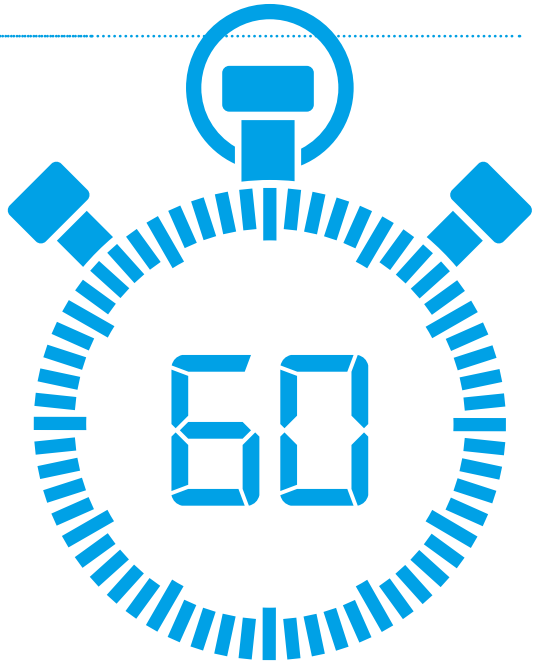
60-SECONDS WITH:

JON FELCE
PARTNER
COOKE, YOUNG & KEIDAN



Q What do you like most about your job?

A The people with whom I work. CYK is a really collegiate team, and a great place to work!

Q What would you be doing if you weren't in this profession?

A Something to do with sports, most likely football, and maybe in journalism. In my younger years when I had a fuller head of hair, I was often confused for Statto from Baddiel & Skinner days…

Q What's the strangest, most exciting thing you have done in your career?

A The cut and thrust of disputes can be exhilirating, especially in the fraud and asset recovery space where I tend to spend a lot of my time. It's difficult to single out any one example, but personally serving a worldwide freezing order flanked by police officers in case matters got out of hand was pretty exciting. As for strange things, trying to persuade a disbelieving art expert of a client that an artwork he had acquired was a forgery was a unique experience!

Q What is one of your greatest work-related achievements?

A Turning a case around where the consensus had been that it was bound to go to trial and the client was likely to lose. I came up with a strategy and it worked, so we ended up getting summary judgment and the case settled pending an appeal. The happy client ended up paying a fraction of the amount it was potentially liable for.

Q If you could give one piece of advice to aspiring practitioners in your field, what would it be?

A Be positive and enjoy what you do! It goes a long way…

Q What do you see as the most significant trend in your practice in a year's time?

A There are a lot of issues which are likely to converge at around the same time, the economic and political climate here and abroad in particular. One issue perhaps garnering less headlines will be the new procedural gateways in the CPR that are due to come into force from October. I think that this will encourage a lot more fraud and asset recovery cases in the courts.

Q What personality trait do you most attribute to your success?

A Being calm under pressure. There's always a solution out there, the calmer you are the more likely you are to find it and achieve it.

Q Who has been your biggest role model in the industry?

A I can't say there has been any one person in particular. I've learned lots from a wide range of people through the years – what to do, and perhaps most importantly things not to do… That's probably a second piece of advice I would give to aspiring practitioners: try to expose yourself to working with a range of people and styles, and then use what you learn to turn yourself into the type of lawyer you want to be and the one that best reflects who you are.

Q What is something you think everyone should do at least once in their lives?

A Go to a TL4 event of course… if not that, then doing something you dreamed of when growing up, something on your bucket list… . After Italia 90 I always wanted to go to a football World Cup or Euros final, and watch England win it… I made it to the final in 2010 in South Africa, but England's golden generation didn't keep up their end of the bargain. Last year, I was at Wembley for the Euros final, but penalties got in the way. On the back of that, I actually bought tickets for the recent Women's Euros final at Wembley, but ended up transferring them a while ago to go on holiday…. Still, I enjoyed watching England win it on TV with my young girls, one of whom now wants to win a football trophy when she grows up… maybe that will make it third time lucky…

Q You've been granted a one-way ticket to another country of your choice. Where are you going?

A This may come as a surprise to some, but despite the amount of time I spend in Italy, it's not Italy! I can say that with my (Italian) wife's blessing, because as much as we love the Italian, people, food and culture, there's one place that we both reminisce about a lot… and that's Bhutan. We travelled around the country for two weeks about a decade ago, and it was an experience like no other. The thing that resonates most for us is the peace and tranquility of Bhutan, and the nature (and the flight into Paro, which is something else…).

Q What is a book you think everyone should read and why?

A Aside from the White Book? If I went to a desert island (or maybe that should be when I go…) I'd take any book by Ben Macintyre, The Times journalist who now dabbles in writing books about spies. I did a paper on the history of 20th century intelligence at university, so it's been something about which I have always been interested. While a lot of history and modern-day news focusses on (in)famous and larger than life characters, it's actually pretty fulfilling to read and learn how a dead homeless man or the granny next door probably had just as much of an influence – if not more – on the course of history.

Q If you had to sing karaoke right now, which song would you pick?

A It's got to be Bohemian Rhapsody, doesn't it?!

ARBITRATION AND FINANCIAL INSTITUTIONS

Authored by: Mikhail Vishnyakov and Yajur Mittal - Cooke, Young & Keidan

In 2016, the ICC Commission on Arbitration and ADR published its seminal report on "Financial Institutions and International Arbitration" (the "ICC Report").

The ICC Report found an "overall lack of awareness" of the benefits of arbitration among financial institutions.

Additionally, it found a "marked reticence" to use arbitration in international financing transactions, where "the outwardly straightforward nature" of the claim against defaulting debtors meant that it made little sense to arbitrate. As put by one institution: "you borrowed the money and you didn't pay it back"[1].

Courts in England and in the US (particularly popular for financial disputes), among other jurisdictions, permit summary determination (i.e., determination without a full trial) of "straightforward" claims. In the years after the ICC Report, the rules of major arbitral institutions have been amended, expressly adding summary determination mechanisms.

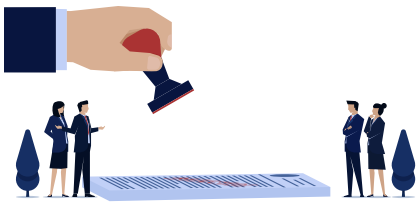
Given the findings of the ICC Report and the subsequent changes to the arbitral rules, this article outlines the benefits of international arbitration and considers whether the changes to the rules are sufficient to convert the reticent.

Benefits of arbitration

The benefits of international arbitration may include:

- Ease of enforcement of arbitral awards – this is often stated to be the key reason why parties choose arbitration for resolving cross-border disputes.
- Neutrality – courts are perceived to be unreliable in certain jurisdictions.
- Technical expertise – the dispute may be resolved by sector-specific experts.
- Finality – there are limited grounds for appealing an arbitral award.

Another advantage is confidentiality, albeit financial institutions do not always consider this to be an advantage, because it leads to reduced predictability (tribunals may reach different outcomes on similar issues) and absence of precedent (which may be helpful when determining the interpretation of standardised documents).



Arbitration in "simple debt claims"

Even in the so-called "simple debt claim" scenario, financial institutions may nonetheless opt for arbitration for reasons such as: (i) unreliability of the relevant local courts; (ii) the borrower's assets are in a jurisdiction where it might be easier to enforce an award; and/or (iii) if a (typically, state-owned) borrower refuses to submit to the jurisdiction of a foreign court.

1 Supplementary Materials to the ICC Report, pages 82 and 93

Changes to arbitral rules

The changes to the arbitral rules since the ICC Report, and the thresholds imposed for summary determination, include:

- SCC Rules 2017: "an allegation of fact or law material to the outcome of the case is manifestly unsustainable" (Article 39(2)(i)).
- HKIAC Rules (2018): "manifestly without merit" (Article 43.1).
- ICC Rules: "claims or defences are manifestly devoid of merit" (the ICC Rules were not amended but the ICC confirmed this mechanism in its Notes to Parties of 1 January 2019 and 1 January 2021).
- LCIA Rules (2020): "inadmissible or manifestly without merit" (Article 22.1(viii)).
- PRIME Finance (2022): "manifestly without legal merit" (Article 35(1)(c)).

The precise procedure to be adopted for such determination is left to the tribunal's discretion, with some rules imposing deadlines by which the determination must be made (for example, the HKIAC Rules (2018) provide that the determination shall be made within 60 days from the tribunal's decision to grant the request for summary determination).

Impact of the changes

Given that the changes are relatively recent, their impact is difficult to assess. That said, the HKIAC statistics appear to be encouraging. In 2017 (i.e., prior to the amendment), only 6.2% of its cases were in the "banking and financial" sector, rising to 16.2% in 2021. On the other hand, LCIA has seen a decline in cases in the "banking and finance" sector; 26% in 2021, down from 32% in 2019; similarly, the SCC statistics do not evidence an upward trend: in 2016, 11 arbitrations (out of 199 new arbitrations) were commenced under credit/loan agreements, falling to 7 out of 165 in 2021. No statistics are available since the changes to the PRIME Finance rules earlier this year, and the ICC statistics do not appear to provide a sector-by-sector breakdown.

Therefore, it remains inconclusive whether the addition of the summary resolution claims mechanism serves to resolve the perceived unsuitability of arbitration for finance transactions. Additionally, a meaningful analysis would need to consider similar statistics in litigation.

As things stand, it is difficult to confirm whether arbitration has gained any ground over litigation in banking and finance cases at all in recent years.

The importance of a transaction-by-transaction analysis

The ICC Report confirms that because financial institutions are involved in a broad range of transactions, a "one size fits all" approach is unsuitable. Accordingly, the benefits of arbitration need to be weighed against its potential disadvantages, such as:

- Inability to obtain judgments (awards) in default: typically, courts have the power to enter judgment against a non-appearing defendant automatically. In arbitration, the UNCITRAL Model Law on International Commercial Arbitration, on which the arbitration laws of many jurisdictions are based, requires the arbitration to continue in the absence of the respondent (Article 25(b)).
- Enforcement of security: as the ICC Report explains: "an arbitral tribunal cannot replace a court with respect to enforcement matters that are exclusively attributed to that court by the relevant statutes" (paragraph 65). Accordingly, the enforcement of some types of security requires the involvement of a national court.
- Interim remedies: arbitral tribunals are unable to grant orders against third parties, given the consensual nature of arbitration. Similarly, obtaining ex parte relief (i.e., relief sought without notice to the other party in circumstances where such notice may defeat the purpose of the relief sought) is likely to be challenging.

Therefore, although the evolution of arbitral rules may make arbitration a more suitable option in a broader range of transactions, that is unlikely to displace the need for a transaction-by-transaction analysis.

Conclusion: keep your options under review

Financial transactions tend to draw on precedent documentation and market practice. Accordingly, the choice between litigation and arbitration may not always be the product of considered analysis. However, the changes to the arbitral rules of major institutions, combined with the existing advantages of arbitration, merit further scrutiny of the dispute resolution mechanism selected by financial institutions.

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