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**INTERNATIONAL ARBITRATION ACTING AS A SOURCE TO  
OVERCOME THE PROBLEMS IN FINANCIAL INSTITUTION<sup>1</sup>****ABSTRACT**

In this fast world, everyone likes to get anything or everything fast. Mobile phone and internet made our lives faster and easy. Even in the matter of food, many people don't like to cook their own food or even go to hotel for eating. With placing order from their mobile they are able to enjoy their meal at home itself. Likewise in recent days, any disagreement between persons is resolved through Arbitration rather than prolonging a person to the regular age-old court litigation. The method of privately resolving the disputes through Arbitration has captivated most of the private and public sector's attention and one among them is the consistently important financial sector. The method of arbitration is being followed by almost every financial sector to resolve the disputes that arise between the parties through relevant contracts. Being consensual in nature, holding neutrality, being more casual than the court hearing, the arbitrator making final decisions rather than the court appeals are the key features that make arbitration better than the court proceedings. This paper draws attention to the rise of arbitration in financial institutions.

**INTRODUCTION**

International arbitration is as much as same as Domestic Court Litigation. But it takes place before private adjudicators called as Arbitrators rather than taking before domestic court. International arbitration allows the parties to resolve their disputes without any procedural rules. It captivate people through its unique features like less expensive, flexibility and quicker process. Arbitration provides more efficient process and procedure than litigation.

**ARBITRATION AND FINANCIAL INSTITUTION**

Arbitration is also known as Alternative Dispute Resolution (ADR) and has been a mode for settling controversies which mainly deals with civil matters. It is generally faster, flexible, and

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cheaper to use arbitration than litigating in courts. It is also consensual, neutral, private, and are widely enforceable. It acts as a legal alternative to tedious litigations. The Arbitration and Conciliation Act, 1996 governs the 'arbitration procedures' in India. Any provisions relating to Domestic arbitration or the International arbitration is held under this act. Any arbitration whether it is administered by the permanent arbitral institution or not is covered under section 2(1)(a) of Arbitration and Conciliation Act and the term 'international arbitration' is defined under section 2(1)(f) of this act. In the case of Jivaji Raja v. Khimiji Poonja & Company<sup>2</sup>, it was observed that "arbitration is the reference of dispute or difference between two or more parties or appointed under statutory authority, for determination of the same.

The life science and Pharmaceutical sector, corporate sector, the technology sector, etc., use arbitration to resolve disputes. In that case, the financial sector falls to be one of those sectors which widely use the arbitration method. Those companies which are engaged in the business dealing which includes financial and monetary transactions are known as a financial institution. Practically the services of financial institutions are crucial for everyone as open-ended or at least periodically. Financial service sectors like banks, brokerage firms, insurance companies, investment dealers, and trust companies encompass a broad range of business operations with financial institutions. As high valued disputes can be handled by institutional arbitration better than ad hoc arbitration most of the financial institutions like International Chamber of Commerce, Singapore International Arbitration Centre, etc., go for the same.

### GROWTH OF ARBITRATION IN FIANCIAL SECTOR

Historically, litigation has more popularity than arbitration in the means of resolving disputes in the finance sector. However, the connotation of using the arbitration method in this area has found its origin since the late 2000s. It was noted that only 23% of financial sectors preferred to resolve disputes through arbitration in the year 2013, according to the International Arbitration Survey<sup>1</sup>. But to overcome the fall faced by the financial institutions due to global crises it becomes more dependable on arbitration. A transition has been taking place due to financial crises concerning the acceptance of the practice of arbitration to resolve financial disputes. By 2019 it was revealed that there is a slight increase in the number of arbitration cases according to the statistical report taken by the International Chamber of Commerce. The benefits of arbitration are recognized by the financial institutions and it uses those benefits to resolve the disputes. Certain advantages lead the financial sectors to rely on arbitration. They are,

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<sup>2</sup> 388 U.S. 395, (1934).

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- The primary reason is the element of confidentiality which leads the financial sector to choose arbitration. Leakage of sensitive information is likely possible when any delicate financial situation like mergers and acquisitions which disturbs international markets worldwide is conferred in the court. The financial institutions rely on arbitration also where the counterparty is in the jurisdiction where foreign judgment is problematic and where the transaction is complex.
- Secondly, to address the requirements of users in financial service sectors many mechanisms and rules have been recently combined. For example, the procedure of summary clearance of some disputes has been brought. Rule 29 has been introduced by the Singapore International Arbitration Centre (SIAC) for the early banishment of a claim. This summary disposal procedure is also found in the Stockholm Chamber of Commerce (SIAC), International Chamber of Commerce (ICC), etc., Further, a set of 'bolt-on' arbitration clauses were introduced by London based Arbitration club to provide with hastening procedures for financial disputes.
- It makes it easier to judge in such situations which lead to a greater level of contentment among the parties because arbitral tribunals have arbitrators with respective intelligence about the subject matter. Thus the Court lacks expertise that the arbitrators generally have. Also, the satisfaction level of both the parties is high and the accomplishment of an arbitral award is much uncomplicated compared to the judgment of any Court.
- Further, new finance specific arbitration bodies like P.R.I.M.E, an international arbitration institution have also entrenched to assure potent resolution of disputes to the financial sector clients.

P.R.I.M.E finance:

The P.R.I.M.E finance is situated in The Hague and was set on 16 January 2012. This center has its own rules to meet the need of the financial markets and offers services like mediation and arbitration to the financial sectors. Experts are available to arbitrate disputes and have their own panel of arbitrators. The P.R.I.M.E Finance Arbitration rules are inspired by the UNCITRAL Arbitration rule and are similar to it.

### LIMITATIONS

There was a study conducted by the ICC on the experiences of financial institutions in arbitration and there were certain issues considered as hurdles that do not allow the financial

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institution to use International Arbitration<sup>3</sup>. Like any other practice, arbitration also has disadvantages and problems.

- Arbitration is generally less costly, but the costs are high in cross border dealings which results in high expenditure for procedure and transportation.
- It also leads to a lack of coordination between the parties and the arbitrator when they belong to different countries.
- If the issue is not arbitral (for instance criminal matters), then arbitration is not possible.
- The financial institution may not obtain urgent interim relief through an arbitral tribunal.

### GROWTH OF ARBITRATION IN FINANCIAL SECTOR

There were few reports which led to the growth of arbitration in the financial sector. This includes,

- The ICC Commission Report on Financial Institutions and International Arbitration.
- The 2013 ISDA Arbitration Guide.
- The P.R.I.M.E Finance Arbitration Rules<sup>4</sup>.

### FINANCIAL TRANSACTIONS WHERE ARBITRATION IS USED:

#### a) Project finance:

International arbitration attracts more interest in the area of project finance than other areas. Much special consideration for dispute resolution is suggested by arbitration which includes loan documentation at the time of currency risk and consolidating the arbitral proceedings under the off-take contract and the loan agreement.

#### b) Investment arbitration:

In the case of Fedax v. Venezuela<sup>5</sup>, there was an issue to determine whether promissory notes were an investment under Art 25 of the ICSID convention and it was considered by the arbitral tribunal that the preparatory work of the ICSID arbitration and considered promissory note as investments. The same was also adopted by the arbitral tribunal in the case of Ablacat v. Argentina<sup>6</sup>.

<sup>3</sup> Duncan Speller, *International Arbitration in the Finance Sector: Room to Grow?*, COMMERCIAL DISPUTE RESOLUTION (Mar. 08, 2017, 09:00 AM), <https://iclg.com/cdr/arbitration-and-adr/7122-international-arbitration-in-the-finance-sector-room-to-grow>.

<sup>4</sup> Shreya Shrivastava, *The Rise Of Arbitration In The Financial Sector*, LAW CORNER (Apr. 11, 2020, 10:14 AM), <https://lawcorner.in/the-rise-of-arbitration-in-the-financial-sector/>.

<sup>5</sup> 37 I.L.M. 1378 (1998).

<sup>6</sup> IIC 807 (2011).

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c) Merger & Acquisitions:

As M&A requires confidentiality and involves complex issues, International Arbitration is considered to be suitable. Disputes related to price adjustment, interim period, for the determination of condition precedent to be fulfilled, etc., are some of the usual disputes in M&A which can be solved through international arbitration.

d) Islamic finance:

In resolving disputes in Islamic finance arbitration constitutes nearly an efficient role. Most of the disputes of Islamic law include disputes relating to property and monetary. Arbitration aims to resolve these disputes efficiently in the interest of justice.

e) Derivatives:

In agreements concerning derivatives, arbitration is considered to be a viable alternative. For drafting the dispute resolution clauses involving derivatives The International Swaps and Derivatives Association's 2013 ISDA Arbitration Guide is used. If the final product being misled by the financial institution to the customer if there is any breach of duty of care owed to the customer by the financial institution, in cases where derivative positions are wrongly valued, if there is any misrepresentation by the financial institutions or if the transactions are invalid are few disputes including derivatives.

### CONCLUSION:

Thus as Aristotle said once *“An Arbitrator goes by the equity of a case, a judge by the law and arbitration was invented with the express purpose of securing full power of equity”*.

Despite having many advantages and disadvantages it is arbitration that stands suitable for settling financial disputes. Most of the financial sectors rely on the arbitration method to get sound judgments. It allows promoting growth when the financial sector focuses on international arbitration. Even in trade, export, and finance agreements arbitration is becoming more common. It offers more procedural flexibility than traditional litigation. Arbitral institutions try to adapt to meet the needs of the user in the financial sector. There is an increase in the use of financial institution arbitration while comparing the current status. But the sad truth is that India is lacking behind other countries in the use of arbitration in the financial sector. However, the Government of India focuses on promoting greater efficiency in Arbitration in the finance sector. The financial institutions are much more benefited with the increased use of arbitration. And it is no doubt that arbitration gains popularity in future in the field of financial sector.

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