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Mediation and Financial Institutions

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The global financial crisis of 2008-2009 increased the litigation caseload of financial institutions. The broad array of claims included debt recovery, foreclosure actions over collateral and claims based on negligence or breach of duty of care. It is generally thought that such claims placed substantial new pressure on legal departments at financial institutions and has prompted these traditionally conservative institutions to consider enhanced use of alternative dispute resolution ("ADR") methods to resolve disputes in a short timeframe. Last year, the International Chamber of Commerce prepared a report on financial institutions and ADR that underscored the potential advantages to financial institutions of referring disputes to ADR. Avoiding the time and expense of extensive discovery, maintaining confidentiality of proceedings and appearing before neutrals with financial expertise are some of the advantages to an ADR program for financial institutions.

Mediation, in particular, can be a very effective tool to manage a heavy caseload. Among the vast range of financial activities, some types of cases seem especially suitable for mediation: (i) international financing, with assets or companies located in several jurisdictions; (ii) advisory matters such as mergers and acquisitions, and transactions related to the sale or acquisition of a business of a company by another investment bank; (iii) asset management and private banking – activities that manage investments on behalf of individuals; and iv) interbank disputes, when an institution enters into a contract with another financial institution.

Of course, mediation is also often appropriate in employment disputes between a bank official and a bank.

In addition to the ADR advantages of confidentiality, mediator expertise and limited discovery, mediation in these types of cases also offers the possibility of a brighter future commercial relationship with the "adversary" party,

since all parties avoid the confrontational aspects of litigation or arbitration proceedings. Further, in international cases, litigation leaves open the potential difficulty of enforcement against assets located in different jurisdictions.

The use of ADR to resolve financial issues has many advantages:

Confidentiality: In certain contexts where standardization of judgments is sought, such as in derivatives, confidentiality may be less desirable (see, for example, the observations in the 2016 ICC Report on Financial Institutions). In sovereign finance matters, confidentiality may also be problematic, since the State may require transparency in relation to its disputes. However, these are narrow exceptions. In most disputes in which financial institutions are engaged, confidentiality is definitely a positive factor. Mediation offers financial institutions the opportunity to avoid the publicizing of internal processes.

Expertise of mediators: Financial disputes often entail specialized knowledge of the instruments used and how financial institutions operate. There are many mediators with vast experience in the financial sector and their ability to speak to principals in their language offers a great opportunity to resolve disputes on bases that make sense.

Future deals on the horizon instead of pending litigation: Litigation often entails extensive discovery and a confrontational environment, where accusations of bad faith and mendacity abound. It is then unlikely that the parties would enter into future business dealings. Mediation certainly can entail the airing of harsh characterizations, but it still provides a better platform for enabling parties to engage in future commercial relationships.

Unbound by rules of evidence: In mediation, instead of being 'buried' by the evidence, the parties can concentrate on putting their most reasonable positions forward, supported by the most pertinent evidence. This not only lowers costs, but enables the parties to put their differences to each other without the stifling effects of evidentiary strictness.

Mediation is not an assurance that the disputing parties will be future business partners. But it is in many respects a "talking cure." By airing their differences in an informal, non-binding setting, the parties often are able to see, in part, the adversary's point of view and come to a financial arrangement that nobody is happy with but everybody can live with.

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