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`Arbitration only if parties agree to it'

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LAWYERS familiar with arbitration cases contend that there are no clear grounds for financial institutions facing a deadlock in negotiations in their quest to merge to go for arbitration.

In a legal context, the option to go for arbitration is effected only if the parties have a contract in which they have agreed to such an exercise, says a lawyer with a Kuala Lumpur-based financial institution.

"Under a legal regime, parties who want to exercise a right to arbitration must have agreed to such in a prior contract," she said.

Thus, in cases where there is no contract as such and banks have only entered into negotiations to merge, neither bank is under compulsion to go for arbitration, she stressed.

Meanwhile, a suggestion that financial institutions do have the option of entering into a specific contract to have the matter resolved by arbitration was shot down by another legal practitioner.

Arbitration may be impractical in such situations as it would be tantamount to leaving the issue in the hands of a third party, he said.

"The issue of mergers is one of willing buyer-willing seller and a decision by arbitration may compel one party to accept a position which it thinks is detrimental to its interests," he said.

This is especially so as a decision of an arbitration body is legal and binding.

The lawyers were asked about comments by Prime Minister Datuk Seri Dr Mahathir Mohamad who on Saturday advised banks that faced a deadlock in their merger negotiations to seek arbitration.

"Be reasonable ... if you cannot make an assessment because of a dispute over the value of the bank, perhaps we can have arbitration," the Prime Minister said.

He was commenting on reports over the weekend that the merger talks involving Bank of Commerce Bhd and RHB Bank Bhd had failed.

Commerce Asset-Holdings Bhd, which owns 97.91 per cent of Bank of Commerce, informed the Kuala Lumpur Stock Exchange on Friday that negotiations with Rashid Hussain Bhd had ceased.

Rashid Hussain later issued a statement to the press, claiming that there was a deal with Commerce Asset.

Several lawyers suggested that the word "arbitration" could be taken to mean mediation by a "go-between" rather than in a legal sense.

In such cases, they stressed, the issue can be guided and settled by a panel of experts drawn from the banking and financial sector, and with representatives from the regulatory authorities.

Parties to the mediation must agree on who sits on the panel and lay down the ground rules of the panel, said one lawyer.

"The parties are not under any compulsion to go for mediation unless it is agreed upon mutually to have a third party involved," she said. "One also cannot discount the possibility that parties to a mediation can refuse the terms proposed by the mediator."

Echoing the opinion of many in the banking industry, the lawyers said the success of such mediation nearly always boils down to valuation and management of the merged entity.

"It will not work unless parties in the merger decide on who is to be the leading personality in the merger," one lawyer said.

Analysts said the idea of arbitration for bank mergers will depend on

numerous factors such as the problems faced by the respective banks.

"If a merger is synergistic to the operations of the merged entity and the only contention is the price, then arbitration is a good option," said one analyst.

Another analyst said Bank Negara - which has the necessary knowledge in banking matters - is the right body to be an arbitrator in cases where negotiations for mergers have broken down.

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