

Arbitration in swaps and derivatives: new guidance from ISDA

On 9 September 2013, the International Swaps and Derivatives Association (ISDA) released its Arbitration Guide. ISDA members may choose from a range of model arbitration clauses to use with the 1992 or 2002 Master Agreements.

Confirming the trend

The ISDA Arbitration Guide (the **Guide**) reflects a growing trend towards arbitration in the financial sector. This development has been prompted, amongst other factors, by the increasing involvement of parties from emerging markets in cross-border financial transactions. Foreign court judgments may prove difficult to enforce in such jurisdictions, especially where there are no reciprocal agreements with the forum state. By contrast, thanks to the New York Arbitration Convention (to which nearly 150 states are party), arbitral awards enjoy a high degree of portability.

Responding to industry demand, ISDA launched a consultation process in January 2011 to examine alternative arbitration language for use with the ISDA Master Agreements (**ISDA Masters**). The 2013 Arbitration Guide reflects the feedback given by members from all jurisdictions – including Clifford Chance LLP – during the consultation process. It comprises a guidance section, including an overview of arbitration, and seven Appendices containing Model Clauses. In addition to a model arbitration clause, the Model Clauses each contain a brief introductory section explaining when and how they are to be used, as well as a number of provisions amending or deleting relevant parts of the ISDA Masters to render them compatible with the arbitration clause.

The Model Clauses in a nutshell

Their aim

The Model Clauses provide an alternative to the existing jurisdiction clause in the 1992 and 2002 ISDA Masters. Although they are intended primarily to be included in new

agreements, they can be adapted for use with an existing ISDA Master.

Their structure

Each Model Clause contains:

- a provision on the law governing the ISDA Masters;
- a provision deleting the existing jurisdiction clause in the ISDA Masters;
- an arbitration clause covering the choice of rules, seat, language, number of arbitrators and appointment process; and
- provisions amending the wording of other sections of the ISDA Masters to bring them in line with the arbitration clause.

English law and New York law remain the default governing law options

It was debated, in the course of the consultation process, whether other alternatives should be provided in the ISDA Masters. However, it was decided that the choice of solely English or New York law maintains the universal standard that the ISDA Masters offer.

Jurisdiction over non-contractual claims

The Model Clauses expressly cover disputes relating to non-contractual claims arising out of or in connection with the ISDA Masters.

Eleven different combinations

There are eleven Model Clauses divided into seven Appendices. They each provide for a different combination of arbitration rules, seat and governing law:

Rules	Seat	Governing law
ICC	London	English law
	New York	New York law
	Paris	English or New York law
LCIA	London	English law
AAA- ICDR	New York	New York law
HKIAC	Hong Kong	English or New York law
SIAC	Singapore	English or New York law
Swiss Rules	Geneva or Zurich	English or New York law
P.R.I.M.E. Finance	London	English law
	New York	New York law
	The Hague	English or New York law

One or three arbitrators

All of the Model Clauses include alternative provisions allowing for the appointment of either one or three arbitrators. In addition, they provide the option for the president of the arbitral tribunal to be nominated or appointed by the co-arbitrators rather than by the arbitral institution.

Comment

Together with the guidance notes, the Model Clauses provide ISDA members with a basic introduction to arbitration as well as clear, user-friendly clauses covering common combinations of arbitration rules and seats.

As highlighted in the Guide itself, the Model Clauses can be amended. Parties are free to choose a different seat or set of rules, so could, for example, opt for arbitration under the ICC or P.R.I.M.E. Finance Arbitration Rules seated in Hong Kong or Singapore.

Although the Model Clauses were deliberately kept simple, additional provisions may be included to cater to specific requirements or transactions.

The Guide provides some useful pointers in this respect, as it addresses many of the additional issues that were raised by members in the course of the consultation process and that reflect traditional concerns of financial institutions in relation to the arbitration of financial disputes.

For example, ISDA members may wish to tailor their arbitration clause by adding:

- an option giving one party the right to choose between arbitration and litigation before state courts after the dispute has arisen;
- a "fast-track" arbitration provision allowing for accelerated proceedings;
- a provision to deal expressly with issues of capacity (e.g. when contracting with a State entity);
- a provision expressly providing for the confidentiality of the arbitration proceedings; or
- a requirement for the arbitrators to have particular expertise or qualifications.

However, the Guide recommends that members seek specialist advice before amending the Model Clauses. Optional arbitration clauses, for example, can lead to enforcement difficulties in certain jurisdictions (see our previous briefing [Unilateral option clauses in arbitration: a survey as to their effectiveness](#))

The ISDA Arbitration Guide not only confirms the trend towards arbitration in the financial sector, it should also prove a catalyst for further developments in this area, spurring other sectors of the industry to examine more closely the advantages (and disadvantages) of arbitration.

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