

ISDA publishes model arbitration clauses for Master Agreements

CONTENTS

Speed read | Background | Key features of the ISDA Arbitration Guide

Speed read

The International Swaps and Derivatives Association (ISDA) has today published the [2013 ISDA Arbitration Guide](#). The Arbitration Guide is a significant addition to ISDA's suite of documents for derivative transactions. It provides a range of model arbitration clauses, specifically tailored for use with the industry-standard ISDA Master Agreements, together with general guidance on the use of arbitration in a derivatives context.

Background

The 1992 and 2002 ISDA Master Agreements are the global market standard form master agreements for over-the-counter (**OTC**) derivatives transactions. A Master Agreement establishes the contractual framework between the parties and governs the range of derivative transactions between them. It is comprised of a standard printed form, which sets out the principal clauses in details, including provisions dealing with close out netting following a default, and a Schedule in which the parties make various elections and specify certain variables and to which they can add additional provisions to tailor the Master Agreement to their specific requirements.

Both the 1992 and 2002 versions of the ISDA Master Agreement provide for the parties to choose between English and New York governing law and, according to that choice, to submit to the jurisdiction of the English or the New York courts to resolve any disputes arising in relation to the Master Agreement or any transaction governed by it.

In recent years, however, an increasing number of users of the Master Agreements have preferred arbitration as their method of dispute resolution and have amended the Master Agreement accordingly. This has been particularly common in emerging market jurisdictions, for example, in Asia, where difficulties in enforcing judgments across borders have combined with concerns about the experience and suitability of courts in some jurisdictions to hear disputes arising out of complex financial transactions to make arbitration an attractive alternative.

In January 2011, ISDA published a memorandum to its members highlighting this development and canvassing members' views on steps that ISDA could take to assist members in their use of arbitration. ISDA members enthusiastically responded to this memorandum, and to extensive further rounds of consultation which included meetings in Singapore, London and New York. The culmination of the process is the publication of the 2013 ISDA Arbitration Guide. Allen & Overy acted as counsel to ISDA throughout this project.

Key features of the ISDA Arbitration Guide

The Arbitration Guide provides general guidance on arbitration to ISDA members, plus a range of model arbitration clauses. Click [here](#) for the Guide.

The general guidance explains key concepts of international arbitration, such as the significance of the “seat” of arbitration and of the choice of arbitral rules, as well as some of the factors often cited as potential advantages and disadvantages of arbitration.

The model clauses are the centrepiece of the Arbitration Guide and have been designed for use with the Master Agreements. The model clauses are intended to be inserted in the Schedule to a Master Agreement, and have the effect of deleting the jurisdiction clause set out in Section 13 (b) of the Master Agreement and replacing it with an agreement to arbitrate disputes. The model clauses effect further amendments to adapt other provisions of the Master Agreement (such as appointment of process agents and waiver of sovereign immunity) so that they operate properly with the choice of arbitration. It is the specific tailoring of the clauses for use with the Master Agreement which distinguishes them from the generic model clauses published by arbitral institutions for use in other contracts.

Although the governing law of the Master Agreement remains either English law or New York law, the model clauses provide a much greater variety of arbitral forums than the traditional choice between English and New York courts. The choice of seats and rules of arbitration was taken in response to member feedback, and it quickly became clear that members wished to see choices available in the clauses beyond England and New York.

At an early stage, parties in the Asia Pacific region were keen to see arbitration clauses for Hong Kong and Singapore, the two leading Asian arbitral centres. Support for further options – both additional choices of rules and seats - led to the expansion of the list. The final version of the Arbitration Guide contains seven appendices, each containing one or more model clauses providing for arbitration under the rules of a particular arbitral institution. The institutions included are the International Chamber of Commerce, London Court of International Arbitration, American Arbitration Association-International Centre for Dispute Resolution, Hong Kong

International Arbitration Centre, Singapore International Arbitration Centre, Swiss Rules of International Arbitration, and the Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance). The choice of arbitral seats is New York, London, Paris, Hong Kong, Singapore, Switzerland and The Hague. This wide choice reflects the global nature of the derivatives market.

The model clauses all follow the same format, save for differences in the clauses designed to accommodate differences in the chosen arbitral rules or the law of the chosen seat of arbitration. They have been kept relatively simple, but the Arbitration Guide also highlights some “add-on” features which parties may consider adding for themselves, such as fast-track provisions.

Given the enthusiasm of ISDA members in providing feedback on the earlier proposals and drafts, it is expected that the model clauses will be taken up by members as a standard from which to work, thereby helping to avoid basic drafting mistakes and to find common ground in negotiations. Having model clauses available may also encourage parties to use arbitration who may have preferred this approach, but would otherwise have been hesitant or reluctant to do so in the absence of ISDA-sanctioned standard provisions. Parties entering into ISDA Master Agreements would be well advised to familiarise themselves with the new clauses.

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