



ISDA Arbitration Guide

The use of arbitration in the financial services sector

The International Swaps and Derivatives Association (ISDA) has, in publishing its Arbitration Guide (September 9 2013), addressed a growing trend towards the use of arbitration as a means of resolving disputes in the financial services sector.

ISDA now has over 840 member institutions from 60 countries and the guide provides its members with an overview of arbitration and includes seven appendices containing 11 model arbitration clauses. The model clauses are designed to be used in derivative transactions documented under the 1992 and 2002 ISDA Master Agreements; the widely used standard form for derivative transactions.

Model clauses

Each model clause provides for a different combination of arbitration rules, seat and governing law. However, each model clause can be amended and parties are free to choose a different seat or set of rules.

Each model clause contains:

- a governing law provision which specifies the governing law of the Master Agreement and of the arbitration clause;
- a provision deleting the existing jurisdiction clause in the ISDA Masters and replacing it with 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.

In each case the governing law of the Master Agreement is either English or New York law, in line with the existing provisions of the 1992 and 2002 Master Agreements.

Comment

The use of arbitration in the financial services sector is becoming increasingly attractive as a result of increased economic activity in emerging markets. Those conducting

transactions in these markets value the neutral forum, the possibility of choosing specialist arbitrators and the fact that arbitral awards can be enforced virtually worldwide in any of the 149 countries that are signatories to the New York Convention. In many cases, therefore, enforcing an arbitral award can be more straightforward than attempting to enforce a foreign judgment.

The publication of this guide is a welcome development; it provides a clear set of model clauses which will go a long way towards resolving the issue of poorly-drafted arbitration agreements. The inclusion of the PRIME (Panel of Recognised International Market Experts) Arbitration Rules will enable financial experts from a number of jurisdictions to sit as arbitrators. However, there is nothing to prevent parties from nominating any arbitrator with sufficient experience. As ISDA identified during the consultation process, it expects the number of arbitrators with derivatives experience to grow naturally as more derivatives disputes are referred to arbitration.

However, it is important to note these are “model clauses” which may not be appropriate in all cases, especially in complex transactions where more detailed or bespoke arbitration provisions may be required.

The model clauses do, however, provide users with a great deal of flexibility and ISDA members may wish to tailor their arbitration clause by adding:

- an “option” allowing parties to choose between arbitration and litigation;
- a “fast-track” arbitration provision allowing for accelerated proceedings;
- an express confidentiality provision; or
- a requirement for the arbitrators to have particular level of expertise, experience or qualifications.

Whilst the guide can be seen as a welcome development, it does not address the lack of jurisprudence on derivatives disputes. There continues to be a reluctance to litigate disputes wherever possible and, as a result, reported decisions relating to derivatives products are relatively rare. Despite previously

suggesting it would release derivative-related arbitral awards in redacted form, ISDA has not dealt with this issue within the Arbitration Guide. Therefore, the success of arbitration in this

sector may depend on whether a workable body of derivatives-related arbitral jurisprudence can be established.

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