Client Alert

**ISDA publishes a new edition of its Arbitration Guide**

The International Swaps and Derivatives Association (ISDA) (advised by Allen & Overy LLP) has published a second edition of its Arbitration Guide (the 2018 ISDA Arbitration Guide). While the basic structure of the Arbitration Guide remains unchanged – reflecting ISDA members' broad satisfaction with the first edition (the 2013 ISDA Arbitration Guide) – a number of new model clauses have been added in response to users' feedback, and amendments have been made to the guidance notes to reflect changes in arbitral rules and market practice over the past five years. This second edition reflects ISDA's intention for the Arbitration Guide to be a "living document" that will be updated from time to time.

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Historically, finance parties have tended to prefer litigation over arbitration for their disputes. In the swaps and derivatives markets, this preference is reflected in the 2002 and 1992 ISDA Master Agreements, both of which provide for the jurisdiction of the English or New York courts. However, recent years have seen an increasing use of international arbitration, especially in Asia and emerging markets. Probably the primary factor behind the growth of arbitration has been the enforcement advantage that arbitration can offer internationally. Under the 1958 New York Convention, arbitral awards rendered in one contracting state are, in principle at least, enforceable with relative ease in nearly 160 other contracting states, subject only to limited exceptions. No comparable regime yet exists for court judgments outside the EU – although this may change as the 2005 Hague Convention on Choice of Court Agreements, which provides for the enforcement of court judgments in civil and commercial matters rendered pursuant to an exclusive jurisdiction clause, attracts a growing number of ratifications.

As the use of arbitration has grown, parties have not always been successful in incorporating effective arbitration clauses into their derivatives transactions. The classic error involves including an arbitration clause in the Schedule without the jurisdiction provisions in Section 13(b) of the Master Agreement being disapplied. This could be interpreted as allowing for parallel resolution of disputes in litigation and arbitration, with a risk of the arbitration clause being regarded as ineffective. Parties have also felt short of guidance on the essential elements of a valid and effective arbitration clause and on the key choices to be made as to (for example) seat, arbitral rules and number of arbitrators.

The origins of the 2013 ISDA Arbitration Guide (on which Allen & Overy LLP also advised) lay in the growing use of, and interest in, arbitration for dispute resolution in derivatives transactions. Before then, ISDA had not published any standard-form provisions for arbitration under the 2002 and 1992 Master Agreements. The 2013 ISDA Arbitration Guide reflected the wishes of ISDA's members for guidance in this regard.
As a result, the 2013 ISDA Arbitration Guide contained a number of model arbitration clauses which conform effectively to the 2002 and 1992 Master Agreements. The model clauses provided for arbitration under seven different sets of arbitration rules (as set out below), at a number of different seats of arbitration. The model clauses were intended to be incorporated into the Schedule to a 2002 or 1992 Master Agreement. The clauses were accompanied by guidance notes, and were prefaced by an introduction about the key features of arbitration. The combinations of seat and arbitral rules in the model clauses reflected the preferences of ISDA’s Members, rather than any preference of ISDA itself.

Since five years have passed since the 2013 ISDA Arbitration Guide, ISDA considers that it is now time for a second edition, in order to ensure that the Guide remains up-to-date with users’ preferences, changes in arbitration laws and rules, and changes in market practice. To that end, ISDA issued a memorandum to its members in June 2018, requesting feedback on a proposed second edition of the Guide. The memorandum sought feedback principally on which further model clauses might be included; and whether the approach taken in the model clauses in the 2013 ISDA Arbitration Guide on recent hot topics such as emergency arbitration, and summary and fast-track arbitration processes, should be amended.

Feedback from the consultation revealed support for the inclusion of further model arbitration clauses in the Guide. The second edition now contains four additional model clauses for use with the 2002 and 1992 Agreements which (in no particular order) provide for arbitration:

- under the SCC Rules with a Stockholm seat and choice of English or New York governing law (but with the arbitration clause governed by Swedish law);
- under the DIS Rules with a Frankfurt seat and a choice of English or New York governing law (but with the arbitration clause governed by German law);
- under the DIFC-LCIA Rules with a DIFC seat and a choice of English or New York governing law (but with the arbitration clause governed by DIFC law); and
- under the VIAC Rules with a Vienna seat and a choice of English or New York governing law (but with the arbitration clause governed by Austrian law).

Meanwhile, the model clauses in the 2013 Guide remain, with only minor amendments. These provide for arbitration:

- under the ICC Rules with (i) a London seat and English governing law; (ii) a New York seat and New York governing law; and (iii) a Paris seat, with a choice of English law or New York Law;
- under the LCIA Rules with a London seat and English governing law;
- under the AAA-ICDR Rules with a New York seat and New York governing law;
- under the HKIAC Rules with a Hong Kong seat and a choice of English or New York governing law (but with the arbitration clause governed by Hong Kong law);
- under the SIAC Rules with a Singapore seat and a choice of English or New York governing law (but with the arbitration clause governed by Singapore law);
- under the Swiss Arbitration Rules with a Zurich or Geneva seat and a choice of English or New York governing law; and
- under the P.R.I.M.E. Finance Rules with (i) a London seat and English governing law; (ii) a New York seat with New York governing law; and (iii) a seat in The Hague and a choice of English law or New York law (but with the arbitration clause governed by Dutch law).

In addition, the 2018 ISDA Arbitration Guide contains a model clause for use with the 2002 ISDA Master Agreement (Irish law), which provides for arbitration under the LCIA Rules with a seat in Dublin. (The 2002 ISDA Master Agreement (French law) already contains a model clause in Part 4 of the form of Schedule, which provides for arbitration under the ICC Rules with a seat in Paris and the clause is not, therefore, repeated in the Guide.)
It is recognised that parties may wish to depart from the combinations of seats and rules in the Guide’s model clauses, even with the expanded list of clauses that now appears in the second edition. Parties may wish to provide for arbitration at different seats, under different rules, or by using a different combination of seat and rules to those set out in the Guide. The model clauses in the Guide are likely to be a useful starting point for any such departure, but it would be sensible to seek legal advice on any move away from them.

Feedback from ISDA’s consultation revealed broad support for the approach taken in the 2013 ISDA Arbitration Guide of setting out ‘plain vanilla’ arbitration clauses which contained the provisions necessary for a valid and effective arbitration clause and the amendments necessary for conformity with the 2002 and 1992 ISDA Master Agreements, but which did not contain further, more complex, and less essential provisions. The model clauses do not, therefore, contain optional language for matters such as consolidation of parallel disputes; joinder of additional parties; confidentiality; fast-track and summary processes; the scope of disclosure; and any right of appeal against an arbitral award (which could be available only in England and Wales).

However, for some transactions (especially more complex and high-value ones), users may wish to consider bespoke additional provisions such as these. This would be consistent with the growing sophistication with which the financial markets more generally, and more particularly the derivatives and swaps markets, now use arbitration. We would be happy to advise you on what ‘optional extras’ are available, when they may be beneficial, and how to draft effectively for those extra features.

Comment

The basic structure of the first edition of the Guide has remained the same in its second edition. This reflects broad satisfaction with the first edition. The second edition builds on the success of the first edition by making the updates necessitated by the passage of five years since the first edition. It also takes into account changes in market practice over that period. In particular, it takes into account that finance parties are now considering a wider range of rules and seats for the arbitration clauses in their derivatives transactions than they were five years ago.

If you would like to discuss the 2018 ISDA Arbitration Guide further, please do contact us directly.

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